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Pleas and Pleadings.

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Pleading is defined to be the mutual allegations between the Plff & Deft in a suit put into a legal form and set down in writing - the allegations on one side & denials on the other 3 Bl. 293. - 2 Bac. 1-10 Co. 132. All pleadings in civil actions in this country as well as in England are required to be in writing. Formerly in England they were delivered viva voce & then minuted down by the prothonotaries - hence frequently in the old law French called the "parol" because by parol - with. sup. -

Pleadings were delivered in Norman French from the conquest to the 36. Edw. 3. From that time to the Commonwealth in Latin. when English was first introduced. at the Restoration the Latin was resumed & continued until the 2d Geo. 2 when the English language was again resumed and continued until this day. Law Pl. 23.29 - 3 Bl. 317. 322. 4 Bac. 1

In strictness Pleadings are nothing else than the setting forth upon the record such facts as constitute the ground of demand on one side and the ground of defence on the other. 4 Bac. 1 3 T.R. 15. Doug. 278 Lord Mansfield says that the rules of pleading are founded in the strongest sense and the soundest and closest logic. Law 23 Every good special plea & declaration is substantially a good sylogism or contains the elements of a good sylogism. 3 Bl. 309. The Major not formally expressed usually, on presumption of the knowledge of the Judge. sometimes it is. as in pleading a particular custom - or a private statute - The major contains the legal principle on which the claim is founded The Minor the facts to which this principle is to be applied

The conclusion is the influence of the law on those facts. or the result from the application of the law to those facts. (ex)
The major or principle of law is denied by, a demurrer, the minor by a general or special issue. i.e. by an issue in fact. but if both are admitted the conclusion can only be answered by alledging some new matter. i.e. by special plea in bar. (the conclusion cannot be directly traversed) as a rule at law.
The replication is also a sylogism. as is the rejoinder and indeed all the different parts of the process to a surrebutter. —
The great object of pleading is to present the claim of the Plff & the defence of the Deft in such a view as will most easily admit of a just and impartial trial. & — a subordinate object is to bring the pleadings to a single point & place the reasoning in the closest & most advantageous light. — The facts are the ground of the decision 1 Bur. 319.

The Writ. —

The original. first stage of a suit, Writ. — A mandatory letter directed by lawful authority to the Shff or other proper officer. issued . . . . to compell the appearance of the Deft. and the suit commences from the issue of the writ. generally. By the general rule & course of the court. The time is the commencement of the suit. and the latitat except when it is upheld to the Statutes of limitations & to avoid a tender or a fine it is given in evidence to support a penal action in point of time is considered but as proof. The Latitat may be before the cause of action. but the declaration cannot be till after it accrues. Comp. 454. 3 Bl. 273. 7 T. R 4. 2 Bur. 960. 6 to Js. 11. 3 Bur. 1323.

* Kings Bench.

(a) Ex. dect. in Trsp. Quare &c. ag.t him who forcibly & tortiously took away his goods & carried them away. Sc. the Defr. has forcibly &c. trespassed on his land & carried away the goods of him. —

In gen.l the writ commences from the issuing of the writ the not universally so. the exceptions known relate to practice not to pleadings vide 3 Bl. 273. Comyn. 454. 1 Wils. 147. 2 Burr 960. Ers Eliz. 6.77. 3 Burr. 1323.

In the Eng. practice the writ issues by itself & the declr is served upon Defr after his appearance in court. The writ contains a general statement of the wrong or contract upon which Plff relies. the decl is an amplification & exhibition of the writ.

Laws Pl. 75.

Placitum is a plea in form a common collection. 3 Bl. 299. 301.

Lawes. 314.

In some states as Conn. the writ & declaration issue together the writ however is the foundation of the suit: although it is not the first stage any more than the declaration. the suit however is not commenced to all purposes untill the service is made. for it was decided by the Sp. Ct. that tender before service is made is good without tendering costs of suit.— the cause of action must exist at the date of the writ.— as in a suit on bond which is not due till the day after the writ issues there can be no recovery.— "Same authy. 1 Root. 486.

The first stage of pleadings is the declaration or count these words are not synonimous and should never be used as such count meaning one cause of action only. declaration all the causes stated. The writ is the act of the court by whom it is issued & is not part of the pleadings. Plow. 84. 1 Inst. 17 a. 3 Bl. 293. 4. Bac 1. 6— The Count or declaration is but an amplification of the writ shewing time, place &c. the writ shews the cause of action though not the facts in particular which the declaration amplifies. 3 Bl. 293. 4 Bac 8.

Pleading in its more limited sense is compond of allegations which succeed the count or declaration, made for the defence of the Deft. or to fortify the count or declaration of the Plff. But the proper signification is all the proceedings and it includes the declaration as well as the subsequent proceedings. 1 Saund 338. 4 Bac 1. 6 Lawes 1. 2. Salk 219.— Ac Etiam is frequently mentioned. it is said in N. York & is a clause inserted in the bill of Middlesex in a suit in B. R. for the purpose of giving that court jurisdiction in actions purely civil. for originally it had cognizance of

those actions only which were committed vi et armis but when the person of the Deft is in the hands of the marshall he may be charged in an action purely civil. & in order to get custody of him the Plff must state that it was done by force & arms. then the writ states that he is to answer a plea and also in an action of debt.

Next Stage after Count or declaration is the Defts plea in answer to the declaration. if Deft does not plead judgement will go by default. 4. Bac. 1.6. Pleas on the part of Deft are two fold. Dilatory Pleas & Pleas to the action. —

Dilatory Pleas are such as tend to delay the suit by questioning the mode of seeking relief; were formerly used at common law for the mere purpose of delay which is not now permitted. — 3 Bl. 301. If well founded they will destroy that action though not the right of action. They have been usually divided into 6 kinds but Judge Gould prefers Blackstons distribution into 3 kinds Viz. First Pleas to the jurisdiction. Second Pleas to the disability of the Plff. Third Plea in abatement. 3 Bl. 301. 2. 4 Bac. 35. The form, object & effect of pleading in abatement are different from pleading to the jurisdiction or to the disability of the Plff so is the conclusion, notwithstanding they are all among the number of dilatory pleas. "sometimes though improperly says L. Gould called pleas in abatement". — 4 Bac. 35. 3 Bl. 301. 2. For the more minute division of dilatory pleas. see Bac. Abridgt Let A. Law 37. 3. Bl. 302 6th note.

Pleas to the action. are answers to the merits of the cause & deny the cause of action entirely either in point of law or fact.

(4) e Often Judgt for Defts on a plea to the jurisdiction or to the disability there can be no further proceedings on that proofs. not so in all cases on plea in abat.t Judgt for Plff on plea in abat.t may be final. not so on plea to Juris.n or disability

(c) A plea in bar may if useful is not generally treated as a distinct plea to the action, it is however for it does not deny the Pffs allegations nor confess & avoid them, but states that he has no right from some cause or other to make such allegations

d' So as the case may be a special plea.—

Comyn. 683.
Hob. 164
2 Lutw. 45
4 Bac. 2

e' i.e. facts as they actually do exist or are supposed to by fiction & implication of law. But in pleading the facts are stated & the premises which the law implies must be stated. Matter of law is also to be stated in the case of a private statute & customs with these exceptions the rule is gen' that it is now necessary to state the law. as

f' It is not sufficient to a plea

First Denial of the Plff's Allegations in Law or fact — Second Confession and avoidance by new matter and Third by matter of estoppel which neither denies nor confesses the Plff's allegation, but shews it to be incompetent for the Plff to make the averment respecting his right to recover. (a) 3 Bl. 303. 305.6. Laws 37.8.115 130. 140. If dilatory pleas are overruled as frivolous the deft has judgment of respondeat ouster. & is then obliged to plead a — Plea to the action viz A General issue or a special plea in bar — Both are really pleas in bar the one general the other special. — 3 Bl. 305. 4 Bac. 54. Demurrer is not a plea but rather an excuse for not pleading, — it is not a denial of the cause of action by fact for it may be in answer to any part of the pleadings as well as to the declaration. 4 Bac. 129. 130. 1 Inst. 72 a. 5 Mod. 132

General Rules applicable to all Pleadings

The matter must be sufficient in law. 2d That it be expressed according to the forms prescribed by law — An omission of the first or defect in substance is the object of a general demurrer. a defect in the latter or mere informality is the ground of a special demurrer. —

As a general proposition, it is necessary to state only facts & as the case may be conclusions from those facts — as before observed. [as a premise is always presumed from the conclusion ~~reasoned~~ Doug. 159 Laws 46. 5 T.R. 70. It is never sufficient to state merely the evidence of the fact. the fact itself must be stated. The law of pleadings has nothing to do with the evidence of facts.

In Indeb. Assumpt. the indebtedness & promise must be both stated 1 Lev. 162. 6 Mo Ab. 383. 1st Chit. Pl. 196. 7. 275. 2d L. Ray 1517. 6 Mo. Ab. 913
A Declaration against a drawer is good without laying a promise — Salk 128. L. Ray. 538. Strange 224. 2d New Rep. 63. note. 4th Mass Rep. 451.
It is not the province of the pleader to draw conclusions from the application of the law to the particular facts. the pleading of a particular law, or local custom or private statute is sometimes called an exception tho' properly speaking it is not so for it is rather stating a matter of fact unknown to the court or which they are not bound ex officio to notice. Laws Pl. 46. 5 T.R. 70. Doug. 159.

Subordinate general rules. 1st All Pleadings must be direct & positive not argumentative or by way of recital, if a pleader says he can prove &c. it is ill not being sufficiently direct & positive 6 Mo Ab. 383. 2 Root. 73. again in trover if the Plff affirms that Defts refuses to deliver up the goods. it is mere evidence of conversion and therefore ill. as conversion is the gist of the action. — the terms of recital are "whereas" inasmuch &c which are bad for averment not being direct and positive. no issue can be formed upon it. "although" quia pro. & quod. quia licet &c are sufficiently positive vid. 1st Ins. 303. Plow. 128. 2 Bac 207 22 97. Laws Pl. 75. 6. 131. 134. 7 T.R. 458. 1st Saund 117. Note 1 & Laws 57. 69. Mo. 734.
2d. Each party admits so much of his adversaries allegation as he does not deny. this is a rule applicable in all stages of the proceeding. 2 Bac. 2. 73. 3d The plea of each party is to be taken most strongly against himself. if it is ambiguous. the same rule obtains in construction of grants, deeds &c

to state the wickedness of a fact merely. he must state the fact substantively. thus sale & purchase is only wch of course the promise must be stated. so on bond demand & refusal is not enough conversion must be stated. that is the gist without a statement of wch nothing can be rendered even a special verdict. Cro. J. 383. 2 Roll. 73. 4. Salk. 663.

In the single case of a decl^n ag^t drawer of bill of ex. or maker of a prom. note. it is not necessary to state a promise. the reason for this is given by Salk. he says the drawing & making is itself an actual promise. so that stating the drawing &c is virtually stating the promise. Kid. B. 196. Salk 128. 2 Ld Ray. 838. Str. 224. 2 Str. 1264. 63rd

+ i.e not by way of inducement nor recital. as in usual Decl^n upon a bill &c. there need be no ipse. This rule however applies only to material allegations. 4 Bac. 22. 97. Mod. 120. 1 Lutw. 103. 1 Saund. 274. note, 1 Sid 117. 1 Keb. 75. 6.

Decided that "dicit" sufficiently positive to introduce the averment of notice in an act^n ag^t indorser of prom^y note.

(Latch. 186)
4 Bac. 2. 73.

& other party may expressly admit as well galen on the other side operating on his own person & thus make it a part of his own case, but I cannot see the use of doing it. for he has the full benefit of it without form or by admitting it. Lawes. 143 4.

D. ... but as it is ultimately favorable. not of course, any material facts time need not be stated truly. The necessity of laying a place as usual [illegible] for the division of counties. & the place must be stated truly. but as to the for a city for murder in the Jurisdiction taken from the county at large.-

+ When the action is transitive and the place laid merely as venue it is immaterial & need not be proved as laid to erect a booth on Boston common in old Essex County. it is immaterial whether Boston bowling were in that town or not. But when the place laid enters into the description of thing itself or of act or subject matter in question as in Trespass quare it must be proved as laid.

+ Trespass or is an immaterial point is a formal defect & in some cases is ignored as immaterial. - it is taken advantage of by special demurrer only & is cured by verdict.-

As each party is supposed to make the most of his own case.
1st Inst. 303. Hob 234. Plow. 202. 4 Bac 2 Salk 186. Laws 52. Salat. 186.
2d In pleading facts of a traversable nature the time when and place where must be laid. The rule includes time, merely for the sake of certainty. Place. as the jury were to be taken de vicinet: necessary in local actions by way of venue: in transitory actions it is aided by fiction. for by Com. Law it could not be tried but in the same County where the cause of action arose. (Mem. by a traversable fact is meant a fact traversable by special issue Laws 57.) 3 Bl 382. 5 Gil Hist. 6 Pl. 78. 83. 4 Com. Dig. Tit. Plead. H 1. There is a difference between laying the place by way of venue and by way of local description. the latter is the most material. If the action is transitory the venue is immaterial† 2 East 297. 11 East 226. 4 T.R. 561

The number. quantity or price of a thing need not be stated truly except when a mistake would occasion a variance. and no mistatement can work a variance except in case of an express contract or record. Laws Pl. 49.

5th Pleadings are not injured nor vitiated by mere surplusage but repugnancy (self contradiction) in a material point is a fatal mistake# 6 Co 1a. 377. 549. 618. 11th Co 42. 1st Inst. 303. 2 East 333. Laws Pl. 63 to 65. & 170. Co. Litt. 288.)

6th The most legal mode is to plead every thing according to its legal effect. facts however may be pleaded as they are as if one Joint tenant enfeoff another Tenant for life. grants an estate to the Reversioner or if a Debtor covenants not to sue his debtor: the legal effect in these cases is

a release. and may probably ought to be so pleaded. but the plea may be according to the strict facts. — viz as covenants. 4 Bac 100. 265 1 Inst 103 b. 200 b. Cro Eliz 599. Ld Ray. 400. 1 Saund 96.7 2^d Henry Bl. 11 the last case decisive that the pleading may be either way.

7th That which sufficiently appears on record need not be averred. as it is nugatory to say that £100 is of the value of £100. 1 Inst 160. 25 a. 7 b. 40. 9 b. 52. a & b. 1 Inst 303. 2^d R. Rep 77 Laws 48. 4 Bac. 2.

8th When any circumstance is implied in a fact already stated that circumstance need not be alledged — as every feoffment implies livery of seisin. — 1 Inst 303. b. Laws 48.

9th Whatever is admitted by parties in their pleadings cannot be contradicted even by the verdict. 4th Bac. 2. 2 Mod 5. Bulln 289

10th A General estate in fee simple may be pleaded generally. but a particular estate as a term for years must be pleaded specifically stating its commencement &c as a fee simple may commence in tort but a particular estate must begin by covenant. Ld Ray. 333. 3^d Wil 72. Laws 27.

11th What are called immaterial averments must often be proved or the party making them will fail. When a variance would be the consequence of not proving an immaterial averment. it must be proved. Bl. 1104 Doug. 640. 2^d East 497. 3 T R 446 5 Esp. 318 33. 2 East 446. Bulln 5. 2 McNal. 501. 513 Laws 48.

12th If the pleadings on either side are defective in matter of form as, as to time or place. they are cured by the adverse party's pleading over instead of demurring specially (either party is bound to anticipate every possible answer which may be given to his plea. 2 Wils. 100 2 Burr 1032. Ld Ray 400. 1 Saund 299.)

1 T.R. 446
Com. Dig. Pl.
(C) 37.

+ This rule does not admit of argumentative pleading & that no fact need be averred wh. may be implied from the record. it presupposes that the fact not averred to be necessarily implied & inserted in the facts on record. as in the case pld of trover or trespass for $100 without saying any such" to be stated in these actions.

+ For the Jury are to find what is an issue between the parties. if the record contradicts what is admitted on both sides. it is quoad hoc. void

+ The test is a matter of fact of wh. the Jury can judge. the court is a matter of law wh. must be pleaded specially, that the Ct may judge of its efficiency. +

(P) An inducement 'foreign' averment need not be proved as that a person having a cocked hat or being the heir of J.S bought &c. But an immaterial averment that is an unnecessary discription of the thing pleaded must be proved. Laid or Pelf family. Bristow v Wright &c Doug. 640.

2 Vent. 232.

+ For it is morally impossible for him to anticipate & negative all the possible answers or defences the other party may make, thus in an act on contract Pl'ff need not allege Def't to have been of full age. not under duress &c. &c. to make the contract. 2 Wils 100 &c. It is not nec'y that new promise must be alleged for with this averment no cause of action appears.

+ Thus Pl'ff is tripped & omitted to allege pos: Def't had that he took the bond from Pl'ffs pos: to prevent &c. & thus [illegible] defeat Pl'ff

If Pl'ff, in a plea like an arbitrary rule but it is founded in strictest justice. for the reason assigned. If a true special plea is entered Def't could [illegible] to the country, he would compel Pl'ff to go to trial & decide the cause on the validity of that plea. By this rule the pleadings are kept close.

If the Declaration be double and the Defts pleads to the action the Declaration is cured. If it contains a material error or defect in substance the adverse party's pleading over does not help it. 7 Co. 25. a. 8 Co. 120. 1 Insts 303. 4 Bac 2. Salk. 519. 3 Lev. 311. Ld Raym. 95. Neither party is bound to allege any thing more than will amount prima facie to a good ground of action or defence. 2 Wils. 100. 2 Burr. 1037. 1 Saund 299 Ld Raym 400.

If the pleading on one side simply avers a material fact before omitted on the other, the defect from the first omission is cured. 1 Lyd. 184. 5 Bac 197. Com. Dig. Pl. C. 85. Tit. Pl. C. 85 & E 37.

Any new matter in any stage alleged by either side, must conclude with a verification [V] by "& this he is ready" and this is the established mode of keeping the pleas open to further reply, which each party has right to by denial, confession & avoidance or demurrer or else or part which right continues until a proper issue is tendered on one part which the other is bound to accept. 3 Bl. 309 1 Saund 103 note. 2 Burr. 772. Comyns 575 Doug. 56. Laws 128. 9. 150. 158. — Special pleas in bar must conclude with a verification — One particular exception the plea of Bankruptcy in England 5th Geo 2d may conclude to the country, Laws Pl. 115. 145. 224. 227. with this we have no concern. —

The answer to the Declaration is the Defts Plea, he may deny the whole by general issue, may plead specially as in justification, accord usury &c. this is confessing & avoiding, or he may demur which is issue in law. the pleadings are closed by general issue or demurrer. if Defts pleads in bar the Plff may traverse & allege special matter in avoidance, to this replication the Defts rejoins. the Plff enters a sur-rejoinder the Defts a rebutter. the Plff a

a surrebutter and the ingenuity of counsel has never been able to carry it further.— 3 Bl. 310. 4 Bac. 6. In all these successive stages each party's allegations subsequent are intended to support the prior declaration - If they do not there is a departure. the plea answers the declaration. the replication is properly the answer of the plea in bar &c on through all the pleadings. A variance is called a departure in pleadings. 1 Inst. 304. 3 Bl. 310. Plow. 76. 4 Bac. 6 Salk. 17. — The judgement of the court on pretences of the law is pronounced upon the whole record. 4 Bac. 131. Hob. 199. 200. 1 Saund. 56. 285. 86. 120. 133. 6. 9th 6. 110. 1 Salk. 173. Thus far of the general rules of pleading.— I shall now treat of the different branches or stages of pleadings in their order more particularly.

Of the Declaration

As the declaration is the foundation of the suit it must show all the Plff's. ground of action and all that is incidentall (principal) to his right of recovery. For no material fact that is omitted can be proved under the declaration. Hobt. 199. Plow. 84. 7 6. 24. 5. 6. Eliz. 325. 6. Jac. 574. 4 Bac. 6. 13. 1 Inst. 17 a. Lawes 68.

If judgment should be moved on such faulty declaration even on verdict it would be erroneous.— If the declaration tho' otherwise good discloses any fact whereat it is equally bad with material omission. as if in an action of debt on bond the declaration says all that is made & unpaid. but the date of the writ is before the day of payment the declaration is defective. 2 Saund. 397. 6. Eliz. 325. 7 6. 24. 5. 6. Jac. 454. 3 Bl. 273. 7 T.R. 4. Plow. 84. 3 Bac 13. 14. 6. Jac. 574. 5 The omission then of any thing which is of the gist of the action is an incurable defect— The gist of the action is that without which there is no cause of action.— 4 Bac 8. 5 Mod. 305. As if in an ac-

+ Act. ass. Def. pleads in bar. Pl. replies ne infra sex annos. Def. rejoins a release this is a discharge. the rejoinder does not support the plea by (Stra. 422.) saying the replication & Def. is silent 2 St. Bl. 280.

+ So if the Rec. is defective in substance Def. must have judg. tho the immediate issue is on the replication or rejoinder.

"Of a nuisance - is that of misfeasance or non-feasance allegata & probata. if in them exists any material fact he cannot be guilty" &c is pronounced a rebuke nisi

"In cases under this rule cannot be reconciled the rule was formerly very strict it was indeed difficult to frame a declr of late however it has been relaxed & now no greater certainty is required in describing the subject matter is required than the nature of the thing will conveniently admit of. The pleaders good sense will instruct him about how distinguishing characteristics a kind of certainty is all that is required Laws 82. 5th Plowd 84. 122. Cro. E. 866. 11 Mod. 53. 114. Salk 368. Stra. 647.

tion of Trover conversion is omitted or of Deft. quid pro quo or of trespass possession. the declaration is faulty & Deft may demur as judgment could never be given for Plff as these are incurable defects.* 3 Bl. 395. 4 T.R. 472. 2 H.Bl. 201. Doug. 658. 2 H.Bl. 201

(It seems settled that if a party bound to perform disables himself he may be sued & recovery had before the time of performance arrives.) The averments in a declaration must be certain. the declaration must contain certainty as to Parties. Time. Place and subject matter. and particularly the latter. The reason of this rule is. that the Deft may plead the judgment in any after suit. other reasons are that the Deft may know how to answer. that issue may be joined. and judgment be awarded. 5 Co 34. 4 Burr. 2456. 1 Day 315. 5 Bac. 272.

+This rule requires no greater degree of certainty than the nature of the thing will admit of. & the degree of certainty is to be determined by the particular case. Vide 1 Chit 303. a. Co. Elizt 78. 97. 560 34.5. 2 Saund. 74. Co Eliz 817 Doug. 683. and 5 Bac. 272 which contains much authority in point. — these quotations are all examples. In trover "Property" or "goods & chattels" "an assortment of goods" "a quantity" "goods wares & merchandize" &c are descriptions not sufficiently certain "Ships & sails" has been determined sufficiently certain. and "25 reams of corn" not sufficient I think differd says Judge Gould "7 Yds linnen" was said to be sufficient & "a library of books" not. these cases are not easily reconciled. — Reason for certainty of judgment by the pleader. Convenient certainty is enough. all matter of inducement or aggravation does not require the same degree of certainty as they are not traversable. By inducement is meant what is necessary to explain or introduce the subject. and by aggravation

show circumstances which shew the enormity under which the theft was committed and neither any of the gist of the action. Laws 66. 70. 118. The words "said" "aforesaid" have not sufficiently certain when there are two or more antecedent subjects to which they are referable. and would be ill for uncertainty as they are not of course referable to the last. "last" or "first aforesaid" or other words equivalent are to be used 2 Ld Ray 888. 8 T.R. 178. 2 East 66. A Declaration may be ill in part for uncertainty and good for the residue. as if Plff in Trover charges conversion of a horse describing him properly & entitles other goods & chattels he may recover for the horse. 2 Saun. 379. 1 Salk. 218. Com. Dig. Pl. C 32. 1 Saund. 286 note. When Declaration is faulty, demurrer or motion in arrest is the proper course & the court ex officio are to notice it. but misnomer or variance between writ and declaration (the latter appearing on the face of the declaration) is taken advantage of by plea in abatement. 4 Bac. A. Salk 212. 220 Laws 177. 1 Bac. 15. If you would plead a contract or conveyance to the validity of which a deed by L.L. is necessary, you must plead the deed or instrument itself. to plead a release from a deed which can be only by deed. the deed must be pleaded. A contract which at C.L. is not good without being written must be declared upon as being written. so also in a contract unknown to C.L. & enacted by Statute. but a contract good at C.L. without writing & required by Statute to be written need not be averred to be written. 1 Bac. 75. 6 Co 38. 43 b 2 Wils 376. Salk 519. 12 Mod. 520. 4 Bac. 656. The writing in last case is to be produced in evidence. The Statute of Frauds & Perjuries merely introduces a new law of evidence. the laws of Pleading remain as at C.L. Bull. 279. 1 Bac. 75.

+ as to pleading a written inst the thing came in. 1 If the contract or survey is required by C.L. to be in writing I must in pleading to have been by deed or a grant or release of an action. 6 Co. 38. 43. 2 Wils. 376. Salk. 519. 2d Vin rule is the same when one is to plead a contract or convey made between C & L. but authorized by Stat I required by Stat to be in writing— as a deposit. Thus you perceive on nothing but simplifica of the gen rule that a party must allege all that is essential to his right or defence. 12 Mod. 520. 4 Bac. 656. 3d Stat in declaring on contracts good at C.L. not void without averment in Stat to be in writing it is not necessary to shew the written contract. In "Statute does not as at C.L. void promise — as to have the debt &c. action. it is made insufficient. however that a written promise in addition — ce [illegible] of [illegible] does not the C.L. pleading. — Whether the writing is not an inst to avoid the right. it is made evidence of a land agt on wh Pl. relies. 1 Bac. 75. 4 Ch. 655 6. 3 Burr 1890. Comyn. 289. 12 Mod 520 Bac. Pl. 29 Salk. 519.

[illegible] in special bar stating a promise to pay the debt of another, the promise must be averred to be in writing, & the declaration stating no ground on which the promise is stated to be in writing, the ground that it must be in writing is not [illegible]

[illegible] 1 Ld. Raym. 646. 1 Salk. 28

[illegible] 1 Ld. Raym. 646 to state what is sufficient, and immediately reciting a long deed, it is sufficient to the other parts of such deed to allow as much as is material

D. And the rule has been very recently that Defendants & Co-Obligors must not join in the actions concerning their estate. But it is now decided in C. P. & B. R. that they may either join or sever. This has always been the rule in Eq. Let former cases be to the first general rule. — For the other hand when the right to be asserted by action is in one person alone in such case the matter cannot be pleaded with [illegible] pleaded in abat. or advantage may be taken of it under the general issue. Bull. 68. Hard 32. Ch. R. 223

[illegible] in covenant where there must be a summons & severance on Eq. is omitted it [illegible] in abat. or by. —

4 Bac. 655.6. 12 Mod 540. 3 Bur 1890. Comp 289. Bull 279—
More strictness is required in special pleas in bar than in declarations. For in the case last above stated if Covenant is to be pleaded in bar specially it must be averred to be in writing. Raym 450. Bull 279. 1 Saund. 276 a. n. Ch. R. 227.

Plaff is not bound to state any more of a deed than is necessary to entitle him to recover. The number of covenants may be indefinitely numerous. If it should contain a proviso which would defeat him he need not state it unless it be in the body of the deed or be a condition precedent. Doug. 642. 2 New Reports 63 notis. 1 Lev. 162 Hyd 196. Salk 128. Ld Ray 838. 2 Root 74.
Declaration may be either general or special the latter being more particular. as in Indebt. Assp. may declare for money had & received or specially for so much received &c— as in Eng. Plaff may in disseisin declare generally or shew his own title
4 Bacon 8.

What Parties may join or be joined in an action
Of the Plff... If two or more persons are jointly in trust in one right they may & ought regularly to join in action for a devastation— The rule has always been the same like wise with respect to Joint-tenants who may now join or sever. (P.) 1 Saund 291. F 753 5 Co 18 & 19. 1 Rus. 164. 2 Lev. 12. 5 T.R. 657. 2 Bac. 696. as respects Joint tenants see 12 East 51. 2 Kaims 169.
Where a right is violated is in one person only he must sue alone. If he takes an assignment must recover. Co. Litt. 143. 1 Lev 315. All the Executors as such must join although one is a minor. Law must proceed if the will or has refused the trust. 1 Saund 291 F. 96. 3 Vin. 130. Salk 3. 1 Vent 95. Grant until between Ex. when appointed.

Executors a common if Diffused are to hold separate actions as their titles are different — The omission of joinder those who ought to have been joined is called non joinder. Abatement may be pleaded to a misjoinder & Mr Gould considers advantageous to plead it under the gen' issue — the non joinder of Executors is pleadable in abatement only.

Actions by B. to deliver to C. B fails — A or B in certain circumstances can sue B. but they cannot join on their facts thus is not joint right 1 Bulst 68. 2 Bac Ab 10. Hob 321. From the following — If two or more have their several rights violated by one and the same act they cannot join in the same declaration. — If same actionable words are spoken of two or more in conjunction at the same time place & they have no joint interest violated. Owen 106. Cro. Ch. 512. 2 Bac. 10. Esp Dig. 504. Bull. 5. 2 Saund 215. 2 Wils 227. 2 Bac. 511. —
If two or more are jointly interested and one dies the executor or administrator cannot join with the survivor the right survives to the survivor entirely and he must recover subject to the right of the deceased. 1 Bos & Pul 45. 1 East 297.

General rules respecting the Joinder of Defendants —
When the cause of action arises out of the joint act, or default of two or more they may be and in case of contracts must be joined as defendants. but when the cause of action does not arise from the joint act, or default they cannot be joined.
Torts are joint & several, contracts are joint — and actions for each are thus to be brought — as in trespass and libel, in which several suits are supposed to be done separately. Hobt. 6. Bull 5.

Pltfs are joinable & sev.l can & are usually as many members of Defts engaged in one as trespass may be joined

Co Dig. 674
1 Buls. 15.
Esp. Dig. 504

§ The remedy survives entire against the survivor

Salk 262. 2 T.R. 199. 2 Bur 985 — 3 Bl. C. 117. Com Dig 674. 1 Buls 15

But two or more persons cannot be sued for distinct torts committed by each of them severally — tho' are no joint acts, there are as many agents as injuries. As if two or more at the same time and place utter the same slanderous words or even one repeats the slander. they cannot be sued together — (In case of libel observe there are joint acts) same auth. — Palm. 313. a fortiori then. If one person is injured by two several torts. at two different times the Defts cannot be joined. if there is no concert. if there is tho' one and no act. they might be. — Stiles 153. 2 Bac. 10. — If two or more bind themselves by joint contract they must be joined because they do not bind themselves to do the act severally. but it is otherwise if the contracts says jointly & severally. 2 Vern. 99 Salk. 393. 3 Bac 697. If they or more bind themselves jointly & severally — the suit must be brought against one or the whole they are all joint or each several. Yelv. 26. 1 Saund 291 (6) 1 Lyd. 238. 3 T.R 782. 3 Bac. 698 — If two or more are joined in one contract, it is joint and not considered several without express words to make it so. 2 Atk. 31. 1 H. Bl. 236. Chit. bills. 175. 3 Bac. 697.

If two persons are bound in joint contract & one dies. his Ex^r is not liable at law to the creditor (8) but if the bond is joint & several, the executor is liable, for the severalty is transmissible 1 East 400. 416. 460. If an action is to be brought against Executors, them only who have administered must be sued, the creditor is not bound to know who is Ex^r but from the acts. The rule is different when Ex^r are Plffs. 1 Saund 291 (g). 1 Lev. 161 Com. Dig Abat. F. 10. 3 T.R. 557. ——

Joinder of causes in one declaration.—

Gen'l rule is— Several distinct causes of action being of the same nature, & between the same parties may be join'd in one declaration, being states in different counts. 4 Bac 11. Com. 244. 1 Bac 30. Com. dig. tit action J:

By causes of the same nature is meant those which require the same judgment at C.L. Now are two kinds of judgment at C.L. which it is important to notice viz. Capiatur and Misericordia. 5 Bac. 191. 4 Bac 11. 1 Bac 31. 2 Wils 319. 1 Vent. 366. Gil. C.P. 87

Actions sounding in force require a capiatur. i.e. that he be taken & confined till he pays fine to the King. All other civ. il cases require a misericordia— that he be in mercy. amerced not confined.— Battery. False imprisonment & Trespass vi et armis may be all joined— 2 notes of hand— action on bond & single contract &c.— Com. Dig. 20. 31. 3 1 Peake 127. 1 Vent 366. 1 T.R 276 1 Wils 252. This not an universal rule: but the following is— If all the counts require the same General issue or Plea & the same judgment they may be joined— This rules presupposes that Plff claims all in the same capacity & the Defts is sued for all in the same capacity— either individually or representatively. 1 Wils. 252. 1 T R 276.

(It has been questioned whether battery & ejectment could be joined. I think they could not says Judge Gould from a circumstance which has grown out of practice viz. the nominal Plff in ejectment is not the real one. Rob. 249. 4 Bac 12)— This Trespass on the case and trover agt bailee may be joined 8 Co. 7 & 8. 2 Bl. Rep. 828. 1 Wils 252 1 Vent. 223 2 Wils 319. 3 East 70. Trover slander & malicious prosecution may be joined— Mgt. st. cit. trover slander malicious prosecution,

+ ⅈ⅋. detin on mesne. bond & loan may be joined tho the joint item is diffr in all. So with detin & detinue.

* & bond in no case. Joint cov & covnt in tort be joined with a covnt in contract, for the pleas will be diffrent. — & in any case the joinder also it always will — if the tort is join with the

each a separate count. Doug. 652. Comyn 230. —

It is by no means necessary that the genral issue be the same. Cro Car 316. 1 Keb. 147 1 Vent 366. 4 Bac. 11. —

Causes of action of same nature accruing to the same person in different rights or capacities cannot be joined — Salk. 10. 2 Strange 1271. 1 Wils 171. 1 T.R. 489. 3 T.R 659. 4 T.R 280. 3 B & P. 7. Causes requiring at 6 L. different Judgments cannot be joined with such can causes in which Genl issue & judgt are all different. — 1 Salk 10. 1 Bac. 30. Trespass on case cannot be joined with contract — Trespass & Trespass on the case for pound. Slander & malpract. cannot be joined — Genl issue in these latter are the same but the judgment is different. 2 Lev. 101. 1 Vent 366. Tr. Ray. 233. 2 Wils 319. 2 Burr 1114 2 Ray 58. Carth 189 5 Mod 90. Salk 10. Non est & account cannot be joined in Declaration Judgt are the same but the pleadings are different. an action of account is altogether sui generis and can be joined with no other action whatever 1 Bac. 21. 4 Bac 11. 1 Mod 22.

Recapitulation. —

1st When the judgment & genral issue are both the same. there may always be a joinder —

2d In some cases different causes of action may be joined when the judgt only is the same

3d When the Judgt are different there can never be a joinder

4 A fortiori then. when the Judgt & genral issue are different there cannot be a joinder

Then may be a misjoinder [when the causes of action are of such a nature as to allow a joinder] from the capacities of the

Parties.— 4 T.R. 347. 8. If diffent causes of action are mis-joined it is an incurable defect. & the Def may either demur or let the suit go on & arrest the judgment. (x) Salk 10. Cowlt 336 3 Lev. 99. 1 H. Bl. 108. A misjoinder is totally diffent from duplicity. A misjoinder is the joinder of diffent causes of action, which cannot be joined to inforce distinct substantive rights of recovery.— A Duplicity consists in join-ing diffent grounds of action to inforce one & the only, right of recovery. the latter is a mere formal not es-sential defect.— A d.c.c in Trespass may charge for breaking house injuring goods & beating servants. it is one continued transaction.— the last is only aggravation to be laid with a Quo pro and is not a distinct cause of action. 4 Bac 12. Stran. 43. 202. Cowp 113. 2 Wils 313. 3 Wils 20. 3 T.R. 292. 1 Burr Bl. 551. 2 T. R. 167. Salk 622. Esp. Dig. 437. Swallow 2 T R 1032. 6 East 388. 5 T R 361. 5 Bac 197. Com dig Barons & F. V. Without a per quod there can be no evidence of loss of service.—

When several actions, of the same nature between the same parties the Court will, in its discretion, enforce a joinder or stop them on distinct affidavits. these actions would without such joinder be vexatious.— 2 Chitty Comb 244 1129. 1178. 2 T R 639. 4 Bac 11. and in Engd the Plff is to pay the cost of the application 2 T.R. 639 1 Chit Pl. 196.—

The distinction between judgments of caption and misericordia are not exist in Court. neither does that of capiatur now exist in England.— The Plff then drops the fine 6/8 which is re-covered in the bill of cost. 5 Bac. 191. to 193.—

shall because it was to exist in part of Ld. 1 Hen Bl. 108. [P]

(+) The point is whether a recent judgt can be rendered when there is no judgt addressed to the case. -

[P] as to the practice of entering nol. pros. as to some counts, when there is a misjoinder to prevent a demurrer, I have only to observe that in some circumstances it may be done. it is however such a practice which determines the question see 1 Saund. 285 (n) 2 B & P. 77. 1 Dr. 169. 1 H. Bl. 108. 4 T. Rep. 346. 360

1st Example is thus mde.— A promises to pay B $100 in consid. of B's building him a house. if B neg. he must aver performance. or it is deemed after verdict. the condition is precedt to a cause of action.—

An example of condition subsequent we have in a penal bond, in defeazance whereof the obligor, and not notice the condition.

The covt. is rejoined & indepndent in this example. e & promises to pay B $100. in consid. of B's promise to build him. here the relies upon B's promise. & B upon e's and neither party in suing need notice the condition i.e. need not aver performance.

2 Wils. 203.

This rule is collected from the cases. thus it uniformly occurs in all books of entries. & is continually practised to insert the consid. in aft. the confession in trespass even on a "ca. sa." or the "scire" when it's exception is inserted accordingly. yet they are all of the gen. of the several actions. But the consid. is sometimes a covt. & sometimes a condn. according to the penl. of the bond. [illegible] 12. [illegible]

Declaration miscellaneous rules —

The Declaration must agree with the writ — as the writ authorizes all the subsequent proceedings D^r & Stu. 84 Leo. 6th. 325. Hobt. 180. 4 Bac 12.13 — When the Pff right of action accrues on the performance of a condition precedent he must aver the performance, if he does not the defect is incurable (+) 7 Co. 10 1 TR 645. 1 Saund 319. 320. 7 TR 125. 2 H.Bl. 574. 2 New Rep. 240. (a) 1 East 203. 208. 619. When the Pff right of action is qualified by a condition subsequent he is not bound to notice it. 7 Co. 10. 1 T.R 638. 1 H Bl. 254. 2 H. Bl. 574. Esp. Dig. 300. The rule is the same if there are reciprocal i.e. independant covenants, but if the covenant is dependant the Pff must aver performance of his part. — Leo 9th 645. Hobt. 88. 1 Vent. 177. 1 Powton Cont. 359. 2 New Rep. 240. a &c. Com. Dig. 265. 2 Lev. 293. 3 Bulst. 187. 5 Co 10.

Those facts which constitute the title must be expressly & positively alledged not by way of inference or recital. Strange 121. 4 Bac 2. 22. 97. Co. Lit. 303. 2 Salk 636. 2 Lev. 206. 1 Mass. Rep. 96.

In case of a mistake of this kind I suppose a special demurrer is necessary 2^d Mod's Rep^ts 358. 1 Wilk 99 Esp Dig 316. an allegation under scilicet or videlicet is not repugnant an sufficient to support a declaration as "a certain note scil. $100" all modern opinions are on this side. 2^d Wils 335. 1 Saund 169. 2 Saund 291. Strange 232. 493. Leo 5th 619. This rule does not hold as to facts not traversable however (pertinent they may be, such as matter of inducement or aggravation. i.e. It does not hold if the fact in question can not be distinctly traversed by plea however immaterial they may be. (P) . . 10 Co 77. Hobt. 5. 18. Leo 6th 116. 46 186. Cro. 177. 4 Bac. 13. 14.

1 Saund 169 & 170. note 2 for forms see Pleadings aft. 10 & onward.—

If the Decl'ation is good in part and ill in part and the whole be demurred to — the demurr will be overruled and the Plff recover on good count — i.e. for lands — Co. Lit. 104. Hob. 178 10 Co. 115. Th. Ray 375 2 Show. 103. 1 Saund 286 note. 2 Saund 379 — This rule is a general rule whenever there are two counts in the declaration, provided the one contains a complete right of action
Com. Dig. Pl. C. 32. E. 36. F. 25. (2) 3. Gil. Com. Pl. 259 & 260. 11 Co. 45.

If under this subdivision a verdict is found with entire damages. that is without distinction referable to the counts. judg.t must be arrested & a venire de novo be awarded, but if damages are severally assessed the Ct will give judgm.t for the good counts. Bull. N. P. 76. 2 Bac. Ab. 10 Co. 130. Doug. 696. 731. 3 Wils. 177. 2 Burr. 985. Str. 1094. 1271. 1 T. R. 508. 532 2 H. Bl. 368. Co. Lit. 104 Hob. 178. The Sup. Ct of Comth. have explained this rule with respect to entire damages, & it stands like a verdict of entire damages on an indict.t or inform.n in Eng.d (1.+)

If. the Jury assess greater damages than is demanded. the Plff may release the excess and take judg.t for the sum demanded or the Court may arrest the. 10 Co. 115. Carth. 19. 21. 5. Bac. Ab. 195. 272. 2 T. R. 123. 113. 1 H. Bl. 643. 4 Bac. Ab. 25. Plff can never recover more than he demands or more than he has a right to from his own shewing. and if judg.t is entered for more on a verdict it is erroneous Stiles 175. 5 Bac. Ab. 195. 272. Doll. 785. 1 Saund. 282. 285 note 5. 4 Bac. Ab. 26. 2 T. R. 113. Mem. 29.

(+) Of however the amount shall be to each shall appear on the record, as in an Act on two bonds. Plff may have judg.t on the good count tho the damages are entire. Cro. J. 194 Hob. 178

(+) upon which the court will make judg.t

(*) When the action is transitory as on bond or note it is no objection that it was exd in another county or State. the apparatus being. "Def.t made seald & executed his ____ at Phila. in Penna. to wit. at St Marys Ibow in the ward of Eastchap" or "at Islington in Middlesex &c" this is not necessary unless the date of the instrument is in a foreign country.

Dilatory Pleas

In Eng. by 32 H. 8 dilatory pleas are admitted without affidavit of their truth or of some matter which shall induce the Ct. to believe them true. - 3 Bl. 302 3 Lev. Bac. 350 51. 3 Wils 52

The three kinds of dilatory pleas are 1st To the jurisdiction of the court. 2d to the disability of Plff. & 3d Pleas in abatement, and first as to Pleas to the jurisdiction of the court such as some privilege of Defts. which exempts him from being sued in such Ct. he must have been sued in his own right not as Ex. or admin. nor as to Defts with some are not privileged. nor is the plea good when his court or that of which he is an officer cannot hold cognisance of the action. - Law 6th. 585 Salk 2 Hobt. 177. 3 Bl. 301. Carth. 11. 354. Salk 544. 2 Bulst. 207.

When the cause of action arose out of the local jurisdiction of the court (as our city courts) 3 Bl. 301. Salk 544. 4 Burr 36

When the Ct. has no jurisdiction of the subject matter if it has not the proceedings may be stayed in any part and the defendant is under no necessity to plead. 10 Co 68. 1 Vent 333. 1 East 352. 4 Bac. 35. Hiscram non jurisdict. Actions local are those in which the Judge is to act in view upon the specific subject matter. 2 all criminal prosecutions. 3 When the subject is local, as Quare clausum (2 T. R 513) Strange 646. Coop 161. 175. 181. 1 H 131. 146. 2 H Bl. 145. 161 2 Wisby 23 4th - Debt ag. assignee or covt. assignee of a lease is local, if for mesne profits ag. assignee (from privity of contract) it would be transitory (*) 2 East 88. 508. Carth 183. 1 Saund 241 (b) 7 Co 2 a. A civil action to recover in Stat. is transitory as are personal actions of assumpsit trover

debt assumpt & Battery &c Comyn 11.1.75.81.

The form of precip is the ground of distinction between civil & crim.

Plea to the jurisdiction is the first in order to be cons-

it is said to be waived by pleading over 1st Inst 127/B.1 Holt 164. 1 Bac 7. 4 Bac. 28.35. In Eng. this plea must be signed by the Dft as the Attys would have to ask leave & by so doing acknowledge the Jurisdiction of the Ct it is not so in Cont. 6 Mod 146. 4 Bac 35. When the action is co-

nam non pros'ed. no pleading can create a waiver. This plea to the Jurisdn concludes praying whether the court will have further cognizance of the cause 3 Bl. 303. Comyn 363. Salk 298. Laws 109. 4 Bac. 35.

When Judgt is given for Dft on plea of this kind he has cost. but if the cause is dismissed ex officio no costs are allowed.

Disability of the Plaintiff—

First cause is Outlawry. This plea is mere and in Cont.

Outlawry is of full force until removed by pardon or re-

versal— 1 Bac. 2. 3 Bac. 761. 2 Hyt. sec 197. 4 Bac. 35. 1 Inst 128a. The outlaw may be sued it is intended to deprive him of a right not give him an im-

munity. 3 Bac 761 Noy 1. 1 Lyd. 65. See also 1 Bac. 14. 7 Co 29. 5 Co 109. Laws 38. 104 3 Bac 761. 12 Mod 400.

Second cause is Excommunication, of no consequence in the US. 1 Bac 3 2 Burn 319 & 320. 1 Inst 133. 4. 8 Co 63. 96.

Third cause is Alienage— an alien friend cannot maintain actions real or mixed because he cannot hold land. but personal actions he can Comyn 171. 3 Bl. 384 2 & Bl 162. 1 Bl. 371.2. Strange 1382. Ruly 413. 1 Bac. 4.83.

† If Plff was an outlaw when the cause of action arose the suit is abated on timely & proper plea only suspends the suit until pardon or reversal. Not long ago this disability was available in N. York. Nowhere however does it extend to suits brot by an outlaw suing as Exr or admr for thus it would operate to the injury of third persons, beneficially interested in the suits. Where outlawry would work a forfeiture of the cause of action itself it may plead in bar as attainder of treason or felony. in other cases only pleadable in abat

‡ Plea that Plff is an alien enemy is an abatement and Deft must aver that he came into Engd with safe conduct from the King 8 T. Rep. 167. Ch. Pl. 238.

And of course they may then maintain malicious.

And of course may maintain petition. Such is a personal action.

The b & L is altered in some states. in N. Eng. & N York the common law rule holds, in Con. an alien must apply to the Legislature for liberty to hold lands. an alien wife cannot hold dower. — The Stat. of U.S. is to all intents who are aliens, by that children of a citizen tho' born abroad & children of naturalized persons not of age at the time of naturalization, are citizens, if resident here — also. Stat U.S. Vol 6. 89. 2 T.R. 308. 1 Bac alien A. Ed. Encyclo and Alien.

An alien friend a merchant may hold lease of a house for years but not a freehold. 1 Rolle 194. 1 Sins. 20 1 Bac alien b. Pop. 36 An alien enemy can maintain no civil action he can enforce no civil rights. Strange 1032. 1 Bac 83. & 1 Ins. 129. (2. 141) Doug. 626. 647 6 T.R 23. 49. 1 B & P. 163. This rule is not universal — he can maintain an action on a ransom bill. (i.e. after the war may 37 6 T.R. 23) it is the rule of nations & the cause belongs to the prize courts. Doug 619. 625 3° Burr. 1734. Man. Ins. 232. 3. By Stat 22 & 23 Gio 3d British subjects are forbidden to give ransom bills.

An alien enemy under safe conduct license or protection from our government has all the privileges of an alien friend. — Ld Ray 282. Salk 46. 1 Bac 84 8 T.R. 166. Strange 1082 or 82. It is unsettled by Eng. authorities whether an alien enemy can maintain an action as Ex^r or admr. I think he cannot. Gio Eliz 142, 683. 1 Bac 84.
an alien friend may maintain an action for chattels real in right of another Gio Ch. 5 or 8. 1 Bac 84. (he is trustee)
On plea of alienage the wife shall answer Dift. 2° Strange 1082. 2 Bac. Tit. Pl. E. pp 36 —

The Fourth cause of disability or the remaining causes are Def: in abeyance, præmunire attainder or being a monk professed. 4 Bl. 380. 3 Bl. 301. 4 Bac. Ab. 148. none of these causes except attainder are known in U.S. and the effect of that is limited to the life of the offender and does not avail against his issue to corrupt their blood. Cons. U.S. art 3 Sec 3.

The Fifth cause of Disability is that of coverture

If a feme sole bring a suit it may be pleaded by Defts that she is a feme covert and it will defeat the suit 1 Inst. 132. 1 Bl. 443. 3 T.R 631. Lawes &c. The coverture is only pleadable by way of dilatory plea not as a plea in bar. It is a general rule that whatever may be pleaded by way of dilatory plea cannot be alledged in any subsequent stage of the pleadings Cath 124. 3 T.R 631. 6 T.R 766. 4 Bac. Ab.

If a feme sole having commenced suit marries pendente lite, her coverture may after this cannot be pleaded to her disability 1 Bl. 316. 4 Bac Ab. - & Comm. Statute has altered this law and says that the husband may suggest the marriage on the record and proceed with the cause Stat 6. 5. 7.

The Sixth cause of disability is Infancy—

Which may be pleaded when a minor sues without a guardian or next friend— he cannot sue by himself or by attorney. 3 Bl. 301. Cadw. 296. 1 Inst. 135. b. Coutts 123. 1 Rolle 258. 8

It may be pleaded that the Plff or person named as Plff is not in esse, as fictitious or dead. - Com. Dig. Abat (E) 16. 17. Bac. Abat F. Whit N. 435. b. 1 Wils 302. 1 Bur + Pul. 44.

So if there is a variance in the decl.ⁿ abat.ᵗ is the proper plea.
So if there is a variance between the instrument as recited in
& the discription of it in the decl.ⁿ It is not usual to take ad-
vantage of this variance by plea in abat.ᵗ in Eq.ᵗ but it
it may be done there. and is our constant practice in C.ᵗ
Com. Dig. "Abatt." "D." 1.ᵗ 2.ᵈ 4.ᵗʰ 5.ᵗʰ 6.ᵗʰ 7.ᵗʰ 8.ᵗʰ 9.ᵗʰ 10.ᵗʰ 11.ᵗʰ 12.ᵗʰ 13.ᵗʰ 14.ᵗʰ 15.ᵗʰ 16.ᵗʰ 17.ᵗʰ 18.ᵗʰ 19.ᵗʰ 20.ᵗʰ 21.ᵗʰ 22.ᵗʰ 23.ᵗʰ 24.ᵗʰ 25.ᵗʰ 26.ᵗʰ 27.ᵗʰ 28.ᵗʰ 29.ᵗʰ 30.ᵗʰ 31.ᵗʰ 32.ᵗʰ 33.ᵗʰ 34.ᵗʰ 35.ᵗʰ 36.ᵗʰ 37.ᵗʰ 38.ᵗʰ 39.ᵗʰ 40.ᵗʰ 41.ᵗʰ 42.ᵗʰ 43.ᵗʰ 44.ᵗʰ 45.ᵗʰ 46.ᵗʰ 47.ᵗʰ 48.ᵗʰ 49.ᵗʰ 50.ᵗʰ 51.ᵗʰ 52.ᵗʰ 53.ᵗʰ 54.ᵗʰ 55.ᵗʰ 56.ᵗʰ 57.ᵗʰ 58.ᵗʰ 59.ᵗʰ 60.ᵗʰ 61.ᵗʰ 62.ᵗʰ 63.ᵗʰ 64.ᵗʰ 65.ᵗʰ 66.ᵗʰ 67.ᵗʰ 68.ᵗʰ 69.ᵗʰ 70.ᵗʰ 71.ᵗʰ 72.ᵗʰ 73.ᵗʰ 74.ᵗʰ 75.ᵗʰ 76.ᵗʰ 77.ᵗʰ 78.ᵗʰ 79.ᵗʰ 80.ᵗʰ 81.ᵗʰ 82.ᵗʰ 83.ᵗʰ 84.ᵗʰ 85.ᵗʰ 86.ᵗʰ 87.ᵗʰ 88.ᵗʰ 89.ᵗʰ 90.ᵗʰ 91.ᵗʰ 92.ᵗʰ 93.ᵗʰ 94.ᵗʰ 95.ᵗʰ 96.ᵗʰ 97.ᵗʰ 98.ᵗʰ 99.ᵗʰ 100.ᵗʰ 101.ᵗʰ 102.ᵗʰ 103.ᵗʰ 104.ᵗʰ 105.ᵗʰ 106.ᵗʰ 107.ᵗʰ 108.ᵗʰ 109.ᵗʰ 110.ᵗʰ 111.ᵗʰ 112.ᵗʰ 113.ᵗʰ 114.ᵗʰ 115.ᵗʰ 116.ᵗʰ 117.ᵗʰ 118.ᵗʰ 119.ᵗʰ 120.ᵗʰ 121.ᵗʰ 122.ᵗʰ 123.ᵗʰ 124.ᵗʰ 125.ᵗʰ 126.ᵗʰ 127.ᵗʰ 128.ᵗʰ 129.ᵗʰ 130.ᵗʰ 131.ᵗʰ 132.ᵗʰ 133.ᵗʰ 134.ᵗʰ 135.ᵗʰ 136.ᵗʰ 137.ᵗʰ 138.ᵗʰ 139.ᵗʰ 140.ᵗʰ 141.ᵗʰ 142.ᵗʰ 143.ᵗʰ 144.ᵗʰ 145.ᵗʰ 146.ᵗʰ 147.ᵗʰ 148.ᵗʰ 149.ᵗʰ 150.ᵗʰ 151.ᵗʰ 152.ᵗʰ 153.ᵗʰ 154.ᵗʰ 155.ᵗʰ 156.ᵗʰ 157.ᵗʰ 158.ᵗʰ 159.ᵗʰ 160.ᵗʰ 161.ᵗʰ 162.ᵗʰ 163.ᵗʰ 164.ᵗʰ 165.ᵗʰ 166.ᵗʰ 167.ᵗʰ 168.ᵗʰ 169.ᵗʰ 170.ᵗʰ 171.ᵗʰ 172.ᵗʰ 173.ᵗʰ 174.ᵗʰ 175.ᵗʰ 176.ᵗʰ 177.ᵗʰ 178.ᵗʰ 179.ᵗʰ 180.ᵗʰ 181.ᵗʰ 182.ᵗʰ 183.ᵗʰ 184.ᵗʰ 185.ᵗʰ 186.ᵗʰ 187.ᵗʰ 188.ᵗʰ 189.ᵗʰ 190.ᵗʰ 191.ᵗʰ 192.ᵗʰ 193.ᵗʰ 194.ᵗʰ 195.ᵗʰ 196.ᵗʰ 197.ᵗʰ 198.ᵗʰ 199.ᵗʰ 200.ᵗʰ 201.ᵗʰ 202.ᵗʰ 203.ᵗʰ 204.ᵗʰ 205.ᵗʰ 206.ᵗʰ 207.ᵗʰ 208.ᵗʰ 209.ᵗʰ 210.ᵗʰ 211.ᵗʰ 212.ᵗʰ 213.ᵗʰ 214.ᵗʰ 215.ᵗʰ 216.ᵗʰ 217.ᵗʰ 218.ᵗʰ 219.ᵗʰ 220.ᵗʰ 221.ᵗʰ 222.ᵗʰ 223.ᵗʰ 224.ᵗʰ 225.ᵗʰ 226.ᵗʰ 227.ᵗʰ 228.ᵗʰ 229.ᵗʰ 230.ᵗʰ 231.ᵗʰ 232.ᵗʰ 233.ᵗʰ 234.ᵗʰ 235.ᵗʰ 236.ᵗʰ 237.ᵗʰ 238.ᵗʰ 239.ᵗʰ 240.ᵗʰ 241.ᵗʰ 242.ᵗʰ 243.ᵗʰ 244.ᵗʰ 245.ᵗʰ 246.ᵗʰ 247.ᵗʰ 248.ᵗʰ 249.ᵗʰ 250.ᵗʰ 251.ᵗʰ 252.ᵗʰ 253.ᵗʰ 254.ᵗʰ 255.ᵗʰ 256.ᵗʰ 257.ᵗʰ 258.ᵗʰ 259.ᵗʰ 260.ᵗʰ 261.ᵗʰ 262.ᵗʰ 263.ᵗʰ 264.ᵗʰ 265.ᵗʰ 266.ᵗʰ 267.ᵗʰ 268.ᵗʰ 269.ᵗʰ 270.ᵗʰ 271.ᵗʰ 272.ᵗʰ 273.ᵗʰ 274.ᵗʰ 275.ᵗʰ 276.ᵗʰ 277.ᵗʰ 278.ᵗʰ 279.ᵗʰ 280.ᵗʰ 281.ᵗʰ 282.ᵗʰ 283.ᵗʰ 284.ᵗʰ 285.ᵗʰ 286.ᵗʰ 287.ᵗʰ 288.ᵗʰ 289.ᵗʰ 290.ᵗʰ 291.ᵗʰ 292.ᵗʰ 293.ᵗʰ 294.ᵗʰ 295.ᵗʰ 296.ᵗʰ 297.ᵗʰ 298.ᵗʰ 299.ᵗʰ 300.ᵗʰ 301.ᵗʰ 302.ᵗʰ 303.ᵗʰ 304.ᵗʰ 305.ᵗʰ 306.ᵗʰ 307.ᵗʰ 308.ᵗʰ 309.ᵗʰ 310.ᵗʰ 311.ᵗʰ 312.ᵗʰ 313.ᵗʰ 314.ᵗʰ 315.ᵗʰ 316.ᵗʰ 317.ᵗʰ 318.ᵗʰ 319.ᵗʰ 320.ᵗʰ 321.ᵗʰ 322.ᵗʰ 323.ᵗʰ 324.ᵗʰ 325.ᵗʰ 326.ᵗʰ 327.ᵗʰ 328.ᵗʰ 329.ᵗʰ 330.ᵗʰ 331.ᵗʰ 332.ᵗʰ 333.ᵗʰ 334.ᵗʰ 335.ᵗʰ 336.ᵗʰ 337.ᵗʰ 338.ᵗʰ 339.ᵗʰ 340.ᵗʰ 341.ᵗʰ 342.ᵗʰ 343.ᵗʰ 344.ᵗʰ 345.ᵗʰ 346.ᵗʰ 347.ᵗʰ 348.ᵗʰ 349.ᵗʰ 350.ᵗʰ 351.ᵗʰ 352.ᵗʰ 353.ᵗʰ 354.ᵗʰ 355.ᵗʰ 356.ᵗʰ 357.ᵗʰ 358.ᵗʰ 359.ᵗʰ 360.ᵗʰ 361.ᵗʰ 362.ᵗʰ 363.ᵗʰ 364.ᵗʰ 365.ᵗʰ 366.ᵗʰ 367.ᵗʰ 368.ᵗʰ 369.ᵗʰ 370.ᵗʰ 371.ᵗʰ 372.ᵗʰ 373.ᵗʰ 374.ᵗʰ 375.ᵗʰ 376.ᵗʰ 377.ᵗʰ 378.ᵗʰ 379.ᵗʰ 380.ᵗʰ 381.ᵗʰ 382.ᵗʰ 383.ᵗʰ 384.ᵗʰ 385.ᵗʰ 386.ᵗʰ 387.ᵗʰ 388.ᵗʰ 389.ᵗʰ 390.ᵗʰ 391.ᵗʰ 392.ᵗʰ 393.ᵗʰ 394.ᵗʰ 395.ᵗʰ 396.ᵗʰ 397.ᵗʰ 398.ᵗʰ 399.ᵗʰ 400.ᵗʰ 401.ᵗʰ 402.ᵗʰ 403.ᵗʰ 404.ᵗʰ 405.ᵗʰ 406.ᵗʰ 407.ᵗʰ 408.ᵗʰ 409.ᵗʰ 410.ᵗʰ 411.ᵗʰ 412.ᵗʰ 413.ᵗʰ 414.ᵗʰ 415.ᵗʰ 416.ᵗʰ 417.ᵗʰ 418.ᵗʰ 419.ᵗʰ 420.ᵗʰ 421.ᵗʰ 422.ᵗʰ 423.ᵗʰ 424.ᵗʰ 425.ᵗʰ 426.ᵗʰ 427.ᵗʰ 428.ᵗʰ 429.ᵗʰ 430.ᵗʰ 431.ᵗʰ 432.ᵗʰ 433.ᵗʰ 434.ᵗʰ 435.ᵗʰ 436.ᵗʰ 437.ᵗʰ 438.ᵗʰ 439.ᵗʰ 440.ᵗʰ 441.ᵗʰ 442.ᵗʰ 443.ᵗʰ 444.ᵗʰ 445.ᵗʰ 446.ᵗʰ 447.ᵗʰ 448.ᵗʰ 449.ᵗʰ 450.ᵗʰ 451.ᵗʰ 452.ᵗʰ 453.ᵗʰ 454.ᵗʰ 455.ᵗʰ 456.ᵗʰ 457.ᵗʰ 458.ᵗʰ 459.ᵗʰ 460.ᵗʰ 461.ᵗʰ 462.ᵗʰ 463.ᵗʰ 464.ᵗʰ 465.ᵗʰ 466.ᵗʰ 467.ᵗʰ 468.ᵗʰ 469.ᵗʰ 470.ᵗʰ 471.ᵗʰ 472.ᵗʰ 473.ᵗʰ 474.ᵗʰ 475.ᵗʰ 476.ᵗʰ 477.ᵗʰ 478.ᵗʰ 479.ᵗʰ 480.ᵗʰ 481.ᵗʰ 482.ᵗʰ 483.ᵗʰ 484.ᵗʰ 485.ᵗʰ 486.ᵗʰ 487.ᵗʰ 488.ᵗʰ 489.ᵗʰ 490.ᵗʰ 491.ᵗʰ 492.ᵗʰ 493.ᵗʰ 494.ᵗʰ 495.ᵗʰ 496.ᵗʰ 497.ᵗʰ 498.ᵗʰ 499.ᵗʰ 500.ᵗʰ 501.ᵗʰ 502.ᵗʰ 503.ᵗʰ 504.ᵗʰ 505.ᵗʰ 506.ᵗʰ 507.ᵗʰ 508.ᵗʰ 509.ᵗʰ 510.ᵗʰ 511.ᵗʰ 512.ᵗʰ 513.ᵗʰ 514.ᵗʰ 515.ᵗʰ 516.ᵗʰ 517.ᵗʰ 518.ᵗʰ 519.ᵗʰ 520.ᵗʰ 521.ᵗʰ 522.ᵗʰ 523.ᵗʰ 524.ᵗʰ 525.ᵗʰ 526.ᵗʰ 527.ᵗʰ 528.ᵗʰ 529.ᵗʰ 530.ᵗʰ 531.ᵗʰ 532.ᵗʰ 533.ᵗʰ 534.ᵗʰ 535.ᵗʰ 536.ᵗʰ 537.ᵗʰ 538.ᵗʰ 539.ᵗʰ 540.ᵗʰ 541.ᵗʰ 542.ᵗʰ 543.ᵗʰ 544.ᵗʰ 545.ᵗʰ 546.ᵗʰ 547.ᵗʰ 548.ᵗʰ 549.ᵗʰ 550.ᵗʰ 551.ᵗʰ 552.ᵗʰ 553.ᵗʰ 554.ᵗʰ 555.ᵗʰ 556.ᵗʰ 557.ᵗʰ 558.ᵗʰ 559.ᵗʰ 560.ᵗʰ 561.ᵗʰ 562.ᵗʰ 563.ᵗʰ 564.ᵗʰ 565.ᵗʰ 566.ᵗʰ 567.ᵗʰ 568.ᵗʰ 569.ᵗʰ 570.ᵗʰ 571.ᵗʰ 572.ᵗʰ 573.ᵗʰ 574.ᵗʰ 575.ᵗʰ 576.ᵗʰ 577.ᵗʰ 578.ᵗʰ 579.ᵗʰ 580.ᵗʰ 581.ᵗʰ 582.ᵗʰ 583.ᵗʰ 584.ᵗʰ 585.ᵗʰ 586.ᵗʰ 587.ᵗʰ 588.ᵗʰ 589.ᵗʰ 590.ᵗʰ 591.ᵗʰ 592.ᵗʰ 593.ᵗʰ 594.ᵗʰ 595.ᵗʰ 596.ᵗʰ 597.ᵗʰ 598.ᵗʰ 599.ᵗʰ 600.ᵗʰ 601.ᵗʰ 602.ᵗʰ 603.ᵗʰ 604.ᵗʰ 605.ᵗʰ 606.ᵗʰ 607.ᵗʰ 608.ᵗʰ 609.ᵗʰ 610.ᵗʰ 611.ᵗʰ 612.ᵗʰ 613.ᵗʰ 614.ᵗʰ 615.ᵗʰ 616.ᵗʰ 617.ᵗʰ 618.ᵗʰ 619.ᵗʰ 620.ᵗʰ 621.ᵗʰ 622.ᵗʰ 623.ᵗʰ 624.ᵗʰ 625.ᵗʰ 626.ᵗʰ 627.ᵗʰ 628.ᵗʰ 629.ᵗʰ 630.ᵗʰ 631.ᵗʰ 632.ᵗʰ 633.ᵗʰ 634.ᵗʰ 635.ᵗʰ 636.ᵗʰ 637.ᵗʰ 638.ᵗʰ 639.ᵗʰ 640.ᵗʰ 641.ᵗʰ 642.ᵗʰ 643.ᵗʰ 644.ᵗʰ 645.ᵗʰ 646.ᵗʰ 647.ᵗʰ 648.ᵗʰ 649.ᵗʰ 650.ᵗʰ 651.ᵗʰ 652.ᵗʰ 653.ᵗʰ 654.ᵗʰ 655.ᵗʰ 656.ᵗʰ 657.ᵗʰ 658.ᵗʰ 659.ᵗʰ 660.ᵗʰ 661.ᵗʰ 662.ᵗʰ 663.ᵗʰ 664.ᵗʰ 665.ᵗʰ 666.ᵗʰ 667.ᵗʰ 668.ᵗʰ 669.ᵗʰ 670.ᵗʰ 671.ᵗʰ 672.ᵗʰ 673.ᵗʰ 674.ᵗʰ 675.ᵗʰ 676.ᵗʰ 677.ᵗʰ 678.ᵗʰ 679.ᵗʰ 680.ᵗʰ 681.ᵗʰ 682.ᵗʰ 683.ᵗʰ 684.ᵗʰ 685.ᵗʰ 686.ᵗʰ 687.ᵗʰ 688.ᵗʰ 689.ᵗʰ 690.ᵗʰ 691.ᵗʰ 692.ᵗʰ 693.ᵗʰ 694.ᵗʰ 695.ᵗʰ 696.ᵗʰ 697.ᵗʰ 698.ᵗʰ 699.ᵗʰ 700.ᵗʰ 701.ᵗʰ 702.ᵗʰ 703.ᵗʰ 704.ᵗʰ 705.ᵗʰ 706.ᵗʰ 707.ᵗʰ 708.ᵗʰ 709.ᵗʰ 710.ᵗʰ 711.ᵗʰ 712.ᵗʰ 713.ᵗʰ 714.ᵗʰ 715.ᵗʰ 716.ᵗʰ 717.ᵗʰ 718.ᵗʰ 719.ᵗʰ 720.ᵗʰ 721.ᵗʰ 722.ᵗʰ 723.ᵗʰ 724.ᵗʰ 725.ᵗʰ 726.ᵗʰ 727.ᵗʰ 728.ᵗʰ 729.ᵗʰ 730.ᵗʰ 731.ᵗʰ 732.ᵗʰ 733.ᵗʰ 734.ᵗʰ 735.ᵗʰ 736.ᵗʰ 737.ᵗʰ 738.ᵗʰ 739.ᵗʰ 740.ᵗʰ 741.ᵗʰ 742.ᵗʰ 743.ᵗʰ 744.ᵗʰ 745.ᵗʰ 746.ᵗʰ 747.ᵗʰ 748.ᵗʰ 749.ᵗʰ 750.ᵗʰ 751.ᵗʰ 752.ᵗʰ 753.ᵗʰ 754.ᵗʰ 755.ᵗʰ 756.ᵗʰ 757.ᵗʰ 758.ᵗʰ 759.ᵗʰ 760.ᵗʰ 761.ᵗʰ 762.ᵗʰ 763.ᵗʰ 764.ᵗʰ 765.ᵗʰ 766.ᵗʰ 767.ᵗʰ 768.ᵗʰ 769.ᵗʰ 770.ᵗʰ 771.ᵗʰ 772.ᵗʰ 773.ᵗʰ 774.ᵗʰ 775.ᵗʰ 776.ᵗʰ 777.ᵗʰ 778.ᵗʰ 779.ᵗʰ 780.ᵗʰ 781.ᵗʰ 782.ᵗʰ 783.ᵗʰ 784.ᵗʰ 785.ᵗʰ 786.ᵗʰ 787.ᵗʰ 788.ᵗʰ 789.ᵗʰ 790.ᵗʰ 791.ᵗʰ 792.ᵗʰ 793.ᵗʰ 794.ᵗʰ 795.ᵗʰ 796.ᵗʰ 797.ᵗʰ 798.ᵗʰ 799.ᵗʰ 800.ᵗʰ 801.ᵗʰ 802.ᵗʰ 803.ᵗʰ 804.ᵗʰ 805.ᵗʰ 806.ᵗʰ 807.ᵗʰ 808.ᵗʰ 809.ᵗʰ 810.ᵗʰ 811.ᵗʰ 812.ᵗʰ 813.ᵗʰ 814.ᵗʰ 815.ᵗʰ 816.ᵗʰ 817.ᵗʰ 818.ᵗʰ 819.ᵗʰ 820.ᵗʰ 821.ᵗʰ 822.ᵗʰ 823.ᵗʰ 824.ᵗʰ 825.ᵗʰ 826.ᵗʰ 827.ᵗʰ 828.ᵗʰ 829.ᵗʰ 830.ᵗʰ 831.ᵗʰ 832.ᵗʰ 833.ᵗʰ 834.ᵗʰ 835.ᵗʰ 836.ᵗʰ 837.ᵗʰ 838.ᵗʰ 839.ᵗʰ 840.ᵗʰ 841.ᵗʰ 842.ᵗʰ 843.ᵗʰ 844.ᵗʰ 845.ᵗʰ 846.ᵗʰ 847.ᵗʰ 848.ᵗʰ 849.ᵗʰ 850.ᵗʰ 851.ᵗʰ 852.ᵗʰ 853.ᵗʰ 854.ᵗʰ 855.ᵗʰ 856.ᵗʰ 857.ᵗʰ 858.ᵗʰ 859.ᵗʰ 860.ᵗʰ 861.ᵗʰ 862.ᵗʰ 863.ᵗʰ 864.ᵗʰ 865.ᵗʰ 866.ᵗʰ 867.ᵗʰ 868.ᵗʰ 869.ᵗʰ 870.ᵗʰ 871.ᵗʰ 872.ᵗʰ 873.ᵗʰ 874.ᵗʰ 875.ᵗʰ 876.ᵗʰ 877.ᵗʰ 878.ᵗʰ 879.ᵗʰ 880.ᵗʰ 881.ᵗʰ 882.ᵗʰ 883.ᵗʰ 884.ᵗʰ 885.ᵗʰ 886.ᵗʰ 887.ᵗʰ 888.ᵗʰ 889.ᵗʰ 890.ᵗʰ 891.ᵗʰ 892.ᵗʰ 893.ᵗʰ 894.ᵗʰ 895.ᵗʰ 896.ᵗʰ 897.ᵗʰ 898.ᵗʰ 899.ᵗʰ 900.ᵗʰ 901.ᵗʰ 902.ᵗʰ 903.ᵗʰ 904.ᵗʰ 905.ᵗʰ 906.ᵗʰ 907.ᵗʰ 908.ᵗʰ 909.ᵗʰ 910.ᵗʰ 911.ᵗʰ 912.ᵗʰ 913.ᵗʰ 914.ᵗʰ 915.ᵗʰ 916.ᵗʰ 917.ᵗʰ 918.ᵗʰ 919.ᵗʰ 920.ᵗʰ 921.ᵗʰ 922.ᵗʰ 923.ᵗʰ 924.ᵗʰ 925.ᵗʰ 926.ᵗʰ 927.ᵗʰ 928.ᵗʰ 929.ᵗʰ 930.ᵗʰ 931.ᵗʰ 932.ᵗʰ 933.ᵗʰ 934.ᵗʰ 935.ᵗʰ 936.ᵗʰ 937.ᵗʰ 938.ᵗʰ 939.ᵗʰ 940.ᵗʰ 941.ᵗʰ 942.ᵗʰ 943.ᵗʰ 944.ᵗʰ 945.ᵗʰ 946.ᵗʰ 947.ᵗʰ 948.ᵗʰ 949.ᵗʰ 950.ᵗʰ 951.ᵗʰ 952.ᵗʰ 953.ᵗʰ 954.ᵗʰ 955.ᵗʰ 956.ᵗʰ 957.ᵗʰ 958.ᵗʰ 959.ᵗʰ 960.ᵗʰ 961.ᵗʰ 962.ᵗʰ 963.ᵗʰ 964.ᵗʰ 965.ᵗʰ 966.ᵗʰ 967.ᵗʰ 968.ᵗʰ 969.ᵗʰ 970.ᵗʰ 971.ᵗʰ 972.ᵗʰ 973.ᵗʰ 974.ᵗʰ 975.ᵗʰ 976.ᵗʰ 977.ᵗʰ 978.ᵗʰ 979.ᵗʰ 980.ᵗʰ 981.ᵗʰ 982.ᵗʰ 983.ᵗʰ 984.ᵗʰ 985.ᵗʰ 986.ᵗʰ 987.ᵗʰ 988.ᵗʰ 989.ᵗʰ 990.ᵗʰ 991.ᵗʰ 992.ᵗʰ 993.ᵗʰ 994.ᵗʰ 995.ᵗʰ 996.ᵗʰ 997.ᵗʰ 998.ᵗʰ 999.ᵗʰ 1000.ᵗʰ

Pleas to the disability of the Plff. conclude to the person "praying judg^t. whether the Plff ought to be answered" — 3 Bl. 303. Tidd 585. Laws 109.

The third kind of Dilatory Pleas are pleas of Abatement. —

Abatement means prostration as of a nuisance. 1 Inst. 134 b. 5 Bac 35. Pleas in abatement generally extend only to the writ and not to the count defects in the declaration are reached by other pleas 3 Bl. 301 to 303. 1 Bac. 15. Salk 298. Carth 172. 3 Lev. 351. 354.

It is not universally true that a plea in abatement reaches only the writ. But a plea which goes to the writ is always a plea in abatement. — When there is a variance between writ & declaration is regularly the object of a plea in abatement. 1 B & P. 647. 3 Bl. 301. 4 Bac. 850. 5 Mod. 132. 144 Laws 105. The writ in b^r consists of that part of the writing which precedes & succeeds the statement of the cause of action or declaration. —

The least inaccuracy in a plea of abatement will be fatal to it because they are not favoured in the law. certainty to a certain intent in every particular is required. Com. Dig. Abat. F. 11. 3 T. R. 185. b 5 T. R. 457. Laws 55. b. 132. 107. 8 T. R. 167. 2 H. Bl. 530. the following divisions.

Causes of Abatement may be either intrinsic or dehors. i.e. such as appear on the face of the writ or such as do not so appear and require proof. —

The first cause of abatement is misnomer or want of addition either in the writ or declaration & is the ground of abatement in Engd Laws 102. 106. 3 Bac 624. Salk 7. 3 Bl. 302. 3 East 167. the addition is the title trade dignity estate or place of abode as required by the Stat 1 H.V. 5 for the sake of certainty Laws 106. 3 Bl. 302. 3 Bac 617. 620. Cro. E. 371. Cartt 14. It has been determined that the degree or mystery trade or occupation with late or present place of abode is sufficient. The Stat of 1 H.V. 5 relates to personal action as heads & indictments and not to real actions + 3 Bac 613 6 Mod 85. A mistake in Defts addition is also pleadable in abatement. this rule respecting addition is of no use in Comm. when the suit is not brought ag+ one in his representative capacity and when the civil office or character is the inducement to the action when, it is necessary, to make out the liability 3 Bac. 620. 2 Mod. 84. Cartt 301. 2 3 Bl. 311. Comb. 65. 2 Ld. R. 1014

So on subject of Abatement by misnomer &c 4 Bac. 38. Syd 40 Cro Chs 114. 1 Saunk 243. 2 Saunk 176. 238. When the addition is of the last kind (which does not come with the Stat. of H.V. 5) if it is unnecessary to the mere marking the person the mistake in it, does not vitiate the writ. 3. Bac 621. Cro Eliz 333.

If one of two Defts is misnamed his Co. Defts cannot plead the mistake - the misnamed defendant must do it himself - or he can waive it if he pleases. 3 Bac 624. 4 Bac 38. Lutridge 36. If the misnamed Defts pleads the mistake in abatement, the suit abates quoad him but it is not settled whether it does in toto. Cartt 96. 8 Co. 159. b 3 Bac 625. 4 Bac 45. (2 H.B.C. 177. 1st part. This is now.

This seems to be a good criterion viz. If the cause of

Addition not required by C. L. except in an instance

Nothing does it extend to mixed actions for exitat de persona. he is sufficiently ascertained by his name & his tenancy. then bring a local description of the subject. 3 Bac 618. 6 Mod 85.

Ab C. L. neither want of addition nor misnomer is pleadable to an indict. for felony. for there could be no trial unless Pris. were personally present & exitat de persona. Cro. Chr. 114. 2 Hawk 186. 1 Ibid 46 And never the that it can avail nothing. for if it destroy, the indict. pris. will be kept until another is drawn. 1 Hawk. 263. 2 ib. 176. 238.

of action is joint & several. it would not abate in toto if it was joint only it must abate in toto if at all:
By C.L. the Defts dignity must be as high as a Knight. i.e. high enough to be considered part of the name or a mistake in it was of no consequence 3 Bac 617. Com 189 Salk 561 —

It is a general rule in Abatement that he who pleads any of these mistakes in name or addition must give his adversary a better writ — 3 Bac 624. 8 T.R 515. Wills 554 Ld Ray 1178. 1 Com. Dig. Abat. I 1 & 2. Laws 39. 103. 4.

The Defts must allege that he was known and called by the name he calls his own at the time the writ issued and must aver that he was not known or called by the name by which he is sued Salk 6 & 7 Ld Raym. 249. 118. 3 Bac 624. 4 Mod 374. Wills 544 this rule is well explained in the last cited report — Salk 6, 7

If the Deft says "and the s^d A.B. the Deft" it is ill for he thus admits himself to be A.B. he ought to begin thus and John Stiles a^t whom the Plff has sued out H. Laws 92. 1 Shower 394. Comth 307. Com 118. 2 Saund 209. & 5 T.R 487. 2 Ch. Pl. 217. 18

Advantage can be taken of misnomer as such, only by plea in Abatement not by plea in bar 1 Roll 750 Comth 124. Salk 2. 3 Bac 161 633. 4 2 H. Bl. 267. 299. Comb. 188. 6 Mod. Rep. 76.

If recognisance of bail is taken from Deft by the name by which he is sued he is estopped from pleading misnomer 2 H Rep 453. Wills 461. Salk 8. to be set out fully

If one receives a specialty by wrong name he must be sued by the wrong name but the true name must appear under an alias — I should suppose d° M° could he ought to be sued in the true name owing the execution of the specialty by the wrong name + Stran. 1218. 3 Bac 616. 617. 1 Bulst. 216. Dian 273. L° Coke says that if an instrument is signed with a wrong Christian name it is fatal. the true name cannot come in under an alias nor can it be sued by the true name with an averment of the mistake 1st Inst 3. 5 Co 43. Willy 554. Stran 1218. 3 East 111. but see Yeom Chit. Pl. 240 L° Co. mistake

When there an usual Deft. the writ should describe them by their proper names severally —

The name of a company is entirely arbitrary. 8 T.R. 508. Lea. br. L. 240.

A Corporation is to be named as it is named in the charter this rule being the reverse of the one just recited. Leach 244.

Deft. has no occasion for his own safety to take advantage of a misnomer. for he may plead the judg' in any after suit & aver that he is one & eadem persona. 3 Bac 625. Strange 1218. 4 Bac 38.

A misnomer of the Plff must be pleaded in abat. & not a replication that the Plff was known & called by one name as well as the other will defeat the plea 1 East 522.

Adding addition to Plff name is no ground for abatement except at C.L. & he is a Knight for the statute of

(+) Mr Gen'l will see that at any rate the rule should be permissive not imperative for the rule as I have laid it down is entirely the usage like. or in the common case of a L B & a B. Surv'r L & B. directs [illegible] not [illegible]

† [illegible] an infant is in many cases liable to be sued & he may have a guardian as
[illegible]

& that it is a rule of C. L. that if an infant is sued
after the restraint of his minority the [illegible] 4 E. 485.

of 1 Henry 5 does not include Plff. & there is no danger of mistake as to him. 3 Bac 617. 618. 1 Show. 392. 6 mod 85. 2 Roll 469. contra de persona.

In bon. it has been determined that a mistake in place of abode is cause of Abat.

2d The second cause of Abt. is that the Deft. is a feme covert. 1 Inst. 132. 1. Syd. 142. 4 Bac. 39.

If a feme sole marries, aft. whom a writ had been commenced. she cannot plead her marriage pendente lite. 1 Bac 9.10. Law Jo. 3223 Str. 811 L R 1525.

If a feme covert is sued alone her only method is to plead her coverture in abatement 4 Bac. 39. Latch 24 Lutridge 23. 1178. As to this rule the books disagree & the true rule appears to be that the fem. Can plead coverture only in abatement. if she does not her husband may appear & plead it in bar, or any stage of the pleadings & if multer is done they must join in a writ of error 4 Bac 9.10. 39. Stile 254 Salk 400. 3 T. R 631. 5 T. R 681. This writ is called a coram nobis or vobis & is brought in the same court that tried the cause 3 Esp. Rep. 16. 19. If two persons sue or are sued as husband & wife who are not married it is good ground of abatement Law 105

Infancy is not a ground of abatement but the trial will be put off until the Infant is summoned & if there is one if not the Ct will appoint one at their time 1 Inst. 89. 135. 4 Bac 149. 150. 5 Co. 53 b 3 Bl. 227

The rule relating to persons in an execution is the same Kirby 174. in Cont by stat.

The third cause of Abatement is the death of parties

At C. L. if a sole Plff or sole Deft died the action abated. 1 Bac
7. 10 Co. 132. 1 Inst. 139. but Eliz. 982.

If one of several Plffs died pendente lite at common law
the action abated, except in case of summons & sevrance pers. ac. 8 Hen. 6 after

In real actions there is no exception of this kind for if
one of the parties dies the suit abates of course 1 Bac 7. 8
10 Co 132. 6 Co. 26.

If one of several defts dies the C L rule is
that the suit shall not abate. the death must be sug
gested on the record and the Plff proceed against the
survivors H. 1. Bac 8. 2 Bac 42 1 Show. 186. 3 Mod. 249.

If a judgt be rendered agt several Defts one of whom
is dead the judgt would be erroneous in toto & the remedy
would be a writ of error coram nobis or nobis. Carth. 1489.

By the Stat. of 17 Ch. 2. 8 & 9 Wm. 3. & a similar one of
Geo. 2 many inconveniences arising from these common
law rules are remedied; by the Eng laws, it is enacted, that if
of several Plffs or Defts some die. if the cause survives to the
survivors the action shall not abate 2 Bac 42. 2 Mod 115

2d As to the death of a sole Plff. pendente lite (or Deft)
The Stat of 6 is somewhat more remedial by that if
sole Plff dies if the cause of action surviving to his Ex. or
Adm. the suit does not abate & so if the cause of ac
tion would survive agt the Ex. or Adm. of the deceased
Deft. — The rule is the same by Eng. Stat if the party dies
after error in the court & before final Judgt 2 Bac 42, St. Cas
222. 3. 2. if Plff dies, his executor may proceed by mere
suggestion of the death on the record, but if sole Deft

+ Held if the writ were lost in the name of two plaintiffs & process & the one then died & proceeded in the name of the survivor his death would not affect the writ, he being no longer a party. 10. Co 132. 6 Co. 20. 1 Bac. 7. 8.

(4) Real action not coming within the stat. it does not declare that the suit shall survive for or against the heir, But if there are no Defts or Pffs I am clear if the cause of act. survive, it is within the stat & will not abate tho by C.L. it would.

Having been used for the purpose of allegation. —

dies the Plff must sue out sci. fa. ag^{t} the ex^{rs} or Admr^{s} to shew cause why judgt should not be awarded against them 4 Bac 42 — The 6th Stat. only relates to actions brought in the Supr^{r} or County courts — but it extended by construction to a single minister — Ld. Ca. 227.

There is one case which was not meant to be provided for — viz. If two Plff die successively — it appears that in such case the right surviving to the last Plff it would survive entire to his Ex^{rs} or Admr^{s}

The 6th by a liberal construction — this plainly for the same reasons this Stat. is extended to petitions for new trials Griswold v. Way. 1 Day.

Real actions still abate in most cases on the death of sole Plff or Def^{t} (+) 1 Bac 7. 9. Bro. Eliz. 892. 1 Inst. 139.

The fourth cause of abatement is called a variance. This is the declaration varies from the writ the writ will abate. as if one speaks of debt & the other of covenant Yelv 6. 1 Bury Bl. 249. 2 Bac 8. 434. (an Exception the other case)

If the variance is in form only a plea in abatement Yelv. 120. Latch. 173 must is necessary to take advantage of it; if it is in substance a plea in abatement is proper but not necessary. it is said For the Court may ex officio dismiss the suit or the judgment may be arrested — This rule however is now out of use as the court will not grant oyer of the writ which would be necessary to plead in abatement the variance (+) Yelv 120 relates to mistake in point of form Latch. as for substance see Robt. 279. Bro Eliz 722. 121. 185. 196 —

By modern decisions a variance between writ & declaration cannot in any case be pleaded in abatement. 2 Wils. 394

4 Mod. 226. Lans 97. Salk 658. 701— A variance betwen the Instrument and upon & the discription of it in the writ is a good cause of abatement. 10 Co. 67 b. 14. 2 Wil. 232. 4 T.R. 314. 16 Com. Dig. Abat. E. 12. Com. 106. 1 Bl R. 87. — If the Instr.t a Jour.l differs from the discription of it in the declaration - advantage of the mistake is to be taken in ev.d evidence under the gen.l issue, this is the usual practice in Eng.d & then works a nonsuit 1 Saund 154 note. Plow 84. Doug. 640 1 Bl R. 7. 1 T.R. 656. 4 T.R. 612. 687. 8 Comyn 766. — In Con.t the advantage may be taken in the same way but the usual way is to file ad the variance in abatement and it is the best course. Com Dig. Action E 12. Abat. G.1. Salk 659. Doctrina Placitandi. System of pleading 1. Advantage of this kind of variance may be taken in 4 ways - 1st Abatement, 2d Gen.l issue, 3 Objecting to its admission in evidence, 4.t by reciting it upon the record by which it becomes part of the Declar.n & then demurring to the declaration 1 Saund. 317. Com Dig. R. 23 Hobt 18. Lans 51. 99. 2 Wils 339 2 Str. 1146 Bull 213 Doug. 208. 13 It was decd in 6.t that it must be a demurr.r to the evidence & not to the Dec.n — wrong for a demurr of this kind can never take place except in an issue in fact which concludes to the country - so do not be misled by Kirby 606. 7 —

The misnomer of a party if it works a variance may be taken advantage of under the general issue — merely as a misnomer it could not. 4 T.R. 612 E. Pltf declares upon a bond of Deft. whom he calls B. he produces it & it is signed A. Advantage is here not taken as a misnomer but as a variance under the general issue. it does not support the Declaration 4 T.R. 612 — 1 Str. 656.

(+) Indeed the rule seems to be universal that where there is a mistake either by way of misjoinder or non-joinder advantage may be taken of it by plea in abat. There is however some perplexity in determining when the objection may be taken advantage of under the gen. issue or by demr. or by motion in arrest.

(+) In other words. Where the fact that a stranger should have been joined in a suit or the fact that one of the actual parties shd not have been joined; is inconsistent with & with any material averment in the decl. advantage may be taken of it under the gen. issue.

Non joinder & Misjoinder of Parties

Plaintiffs. Genral rule. if one person sues alone when several ought to be joined. the non joinder of the other or others is always good cause of abatement. Ex A & B hold a note and A sues to alone the nonjoinder of B. may be plead in Abt — and this rule is universal. 1 Inst 162 (a) 189 (a) 195 (b) 198 (a) Salk 2. 7 T.R 243 1 Saund 291 b.)

But is the same when two more joinin a suit & the right of action belongs to one or part only Ex. debt is due to A & he joins B with him in the suit. The misjoinder as it is called, is a cause of ab at. the former was nonjoinder (+) Ero Elij 143. Hob 72. 1 Rol 294. 1 Leon 315

But when the objection arising from the nonjoinder or misjoinder goes to destroy the declaration. advantage may be taken of it as well under the genral issue, as under a plea in Abt. (+) Ex In an action on contract one Plff sues alone when another ought to be joined. the advantage may be taken under the genral issue for the nonjoinder goes in opposition to the Dec'n the contract was not made to A but to A & B

On the other hand if two or more sue when the right of action is in one the advantage may be taken under the general issue. the contract was made to A not to A & B. — It is a consequence of the two rules that in an action on contract advantage may be taken of the misjoinder or non joinder of Plffs under the genral issue 1 B & P. 75. 2 Stra 820. 2 T.R 282. Peak Ev 205. Bull. 152.

Non joinder & mis joinder

If the action in either of these cases be brot. upon a written instrument. the Defts. may crave oyer of the Instrt. recite it upon the record. & then demur to it 1 Saund 153.2 (n) (f) (g) 1 B & P. 67. Observe that when the action is on a contract. the right of action in one & the Defts. declares it to be in two, the fact denies the Deft. — the contract proved is not the one declared upon — to advantage may be taken of it either under the gent. issue or by plea in abt.

Once again If on contract one sues alone when the right of action vests in two or more & this appears on the Deft. the mistake is fatal upon the record, & that Deft. is demurrable & it is not aided even by a verdict. the verdict is removed by a writ of error. arrest of judg. 2 Ld. Ray. 5 Co 18 (b) Esp Dig 304. 2 Str. 1146 1 Saund 153. 291. 1 B & P 67.

Rule is the same if two sue when on the Deft. it appears that the right of act. is in one only — neither Abt. Gen. issue nor demurr need be pleaded, for the error is on record —

But in an action sounding in tort if one P[illegible] alone when the right of action is in two or more. advantage can be taken only by plea in Abt. Ex. Tres. qu. clausum freg. the trespass was on the land of A & B. & not on A's alone. A sues. the general issue cannot be plead for the entry was on A's land as it was also on B's The error does not destroy the declaration. 1 Sal. 32. 6 T.R. 766 1 Saund 291 g.h. Str. 820. 1116. 5 Co 18. b 3 T.R 699.) it confesses it

Non joinder & mis joinder.—

These rules it will be observed are all dependent on the principle 8 Co 159. 4 Ta R 220. 5 East R 207.—

It is a material rule in practice that if one sues in tort when two or more ought to be joined. the Deft may give in evidence under the genral issue the interest of the other party for the purpose of taking off a moiety of the damages. A & B are joint owners of a horse & C. D. takes him away, if A brings the suit C. D may give in evidence under the genral issue. the right of B. so that A shall recover no more than his share of the animal. advantage should be taken by plea in Abatement 5 East R 207. Peake Ev. 205

On the other hand. If two sue in tort when the right of action is in one. the advantage is taken under the genral issue Ex. A owns goods which C. D. takes away— A joins B with him in an action C. D. pleads the genral issue: for the facts do not support the Declaration but does the genral issue 5 Bac Abr 200 Co Litt 162 misjoinder of plaintiffs always support the gen. issue. non joinders do not.—

If one part owner of a chattel sues alone in tort & the Deft does not plead the non joinder in Abt the other part owner may sue again for his share of the damages— which shews the propriety of permitting Deft to plead the non joinder 7 T. R. 279 1 Esp. 116. 2 Esp R 86. 622

Non joinder & mis joinder of Defts

If one of two partners or joint debtors is sued alone on contract the non joinder must be pleaded in abat. or it is waived unless it appears on the Declaration (which can rarely be the case) to happen when there is another party living

† The objection that matter should be joined to, not like that it is not his act & deed, or that he did not agree & promise, that he is not liable it is not inconsistent with the main averment in the decl.ⁿ in and it goes to prove it.

who ought to be joined. in which case the error is radical & no plea in abt. is necessary.

General Rule is. that the debtor who is sued ought to plead the non-joinder in abt. (but as before observed if it appears on the declaration that there is another party living who ought to be joined then is no need of the plea in abat for advantage may be taken either by writ of error arrest of judgment &c) 5 Burr 2611. 2 Bl. Rep 947. 5 T. R. 651. 2 N Rep 365 1 Saund 291 b note 4. 1 N. Bl. 236 Comp 832. (the case in Salk 420 is not Law says Gould) 5 T.R. 651. 6 id. 327. 369. 716.

As to action arising "ex quasi contractu" it was formerly said the rule was the same. now it is otherwise. now advantage cannot be taken even by plea in abat.—

By a case "ex quasi contractu" is meant a case sounding in tort. but resulting from a breach of contract. Ex. Bailment. the loss arising from negligence or fraud is charging tort. In this case as the rule now is advantage can be taken neither by plea in abat or any other plea.— authorities to the old rule 1 Saund 291 d in notis Carth 62. 3 T. R 369. 2 New Rep 365. 5 Bac 192. 185— for new rule see 3 East 62. 69. 70. 5 T. Rep 649. 651.

I observed to you that if one of two is sued alone whenanother ought to be joined the Deft must regularly plead in Abat— for he cannot rely upon the gen. issue, as if they sued in an action of assumpsit he plead the general issue the objection does not support the gen. issue & so if one of two obligors on bond is sued alone he must for same reason plead in Abat. 1 Inst 283. a. 5 Co 119. 2 Bl Rep 950. 1 B & P. 72. 1 Vent 34.—

Non joinder & misjoinder of parties

When a suit is thus depated if a new action is brought the new deft may plead abt for lack of another deft. thus A B & C are partners. A pleads in abt that B. is not joined in the new action but B may plead in abat. that C is not joined. But he who was sued in the first action cannot plead in abat to the second suit that there is still another deft for he is concluded by his first plea. 3 East 70.

The Gen. Rule is When one of two parties is sued alone he must plead in Abt but if it appears from the declaration or other pleadings of the Plff. that another ought to be joined who is still alive. the deft is in general not aided even by verdict 5 Bur 2614. 3 Bac 698. 1 Saund 291 b & c. 9 Co 52 b. 6 T. R. 769.

This rule applies equally well when two only of them joint and several obligors are sued, or more explicitly when more than one and less than all joint and several obligors are sued. — Observe that no such plea (Abt) is allowed where only one joint & several obligor is sued 1 Saund 291 c.

I have now considered the non joinder of several Defts. If two are joined when only one is liable on contract there is no need of pleading in Abat. for here the objection supports the general issue. as if two are sued on promise or bond executed only by one. this is a case of misjoinder. 1 East 48. 2 Str Rep 954 2 Day 272. And in this case if the jury should find agt. one & for the other

misjoinder of parties.

the jud gment might be arrested by the first for finding that the second did not promise disproves the declaration. — Earth 361. 3 East 62 & in this case the Plff cannot enter a nolle prosequi as to that one. 5 E/p. 47

If two are sued for tort neither can plead (& we cannot in the gen'l form,)
the misjoinder of the other in abat, for one any or all may be sued as torts are several as well as joint
Stra. 993. 509. 8 Co 159. Stra 420 5 T. R 644. 3 East 62
1 Saund 291. b So in torts there is no non joinder nor misjoinder — This is however an exception to this rule where the real property is holden by the Deft and a stranger as when A & B are joint owners bound by their tenure to support a bridge &c upon a site &c. the liability here arises from the condition of the tenure
5 T. R. 651, d 649. 2 East. 574. Ch. Pl. 75. 6.
1 Saund 291 c. 2 Bl. 182. Com Dig. Abat
F 5. The rule to direct you in (we think) these cases, (you will see as collect) is this — If the objection arising from non joinder or misjoinder denies the declaration it need not be pleaded in abatement & if it does not, it must be plead in abatement

Another good cause of Abat. is. the pendency of a prior suit between the same parties for the same thing; for the law abhors a multiplicity of suits. this rule is founded in policy. 1 Bac 13. & Bac 48. — But to abate a subsequent suit on this ground the suits must be of the same kind or at least concurrent in their nature. and although specifically different yet if concurrent a plea in Abat. is good as in case of trover & trespass for the same thing. they cannot be

+ Because the debtor might then permit his goods being attached to answer the debt of the creditor

two recoveries of the same thing 5 Co. 61 a & b. Hob. 184. 466. 4 Ba. but the rule does not hold unless the action is for the same thing. or the same cause of action. — a mortgagee may sue in ejectment. on the bond & file a bill in equity to foreclose. the prior pendency of the one does not abate either of the others same Auth. — To plead one abate. on this ground it is not necessary that the prior suit be actually pending at the time of pleading. — it is sufficient that the first was pending when the second was commenced. for in this case the second was plainly vexatious and void ab initio. (the 1st is now quietly withdrawn &c) 1 Bac. 13 Doc. Pla. 10. 4 Bac 48. And the suit is regularly considered as commenced from the time of issuing the writ. Co. Lit. 11. 5 Co. 48. Comyn 252. 3 Burr. 1423. —

But if on such plea of abate. the Plff can shew that the first suit which was withdrawn. would have been wholly ineffectual the plea will not avail (as if the property of a stranger is attached, or the first action is clearly misconceived the pendency of it will not abate the second for here there is no vexation. & the misconception is a good replication to the plea 1 Root 356. 562

Indeed I suppose that the rule in the spirit of it extends only to those cases in which the second action is wholly unnecessary.

The pendency of an action on book does not prevent the Dft suing the Plff on book 1 Root 155. 4 Mon 136.

This plea, it seems, is good, although there is a new Dft added in the second suit 4. Bac. 49. Hob. 137. 250 Cath 96.7.

A singular case occurred in Fairfield Co. a Defts brot two writs of error on the same day. one for error in fact the other in law. Dfts in Error plead one in abatement of the other & argued both. 1 Com. D. Abat. H. 24.

Misjoinder

1 Bac 13. 14. 1 Show. 71. whether it abates in toto is not fully settled says Mr. Gould. & I find contradictory opinions—

So it is if one of the Defts. in a prior suit is omitted in the subsequent. unless indeed the first action would have been abated by misjoinder Carth 96. 7 Mod. 137. 2 Bac 49. 1 Bac. 13.

If a second action is commenced on the same day with the withdrawing or abatement of a prior one the second is presumed in law to have commenced after the abt. Gil. Com. Pl. 260. Allen 34. 1 Bac 14. 4 Vin. 49 and Mr G. thinks the presumption cannot be rebutted.

But it is no cause of abat. that a prior action for the same cause is depending agt a stranger as if A & B trespass & one of them is sued & then the other & so of joint and several creditors Mod 137 8. Stra. 420. It is not within the reason nor terms of the rule.

And it is no cause of abatement in a criminal case that a prior indictment is depending against the party for the same offence. for the court have discretionary controul over indictments and can quash either of them not so as to informations & appeals for the court has no such controul over them 2 Hawk 275. 367. 245. 190 1 Bac 13. 4 Bac 48.

If two informations are exhibited by two Dfts against the same person for the same offence on the same day each will abate the other. Those informers being volunteers the court will not dispense with the legal maxim "no fraction of a day" in their favour. A day in law is punctum stans.

Informers are not favoured by courts of justice. —
Hob 128. More 864. 5. a diffrent rule is however to be
found in some book see 3 Bur 1434. 1 (obiter)

Another good cause of abat. is that the writ was im-
duly iprid. and in genral any informality or irregularity will abate the
writ 1 Sam. Pl. 106. Com. Dig. Abat. A. 1. Thus if a writ is made
returnable to any other than the next succeeding term of
the court it will abate. the writ is void. the court ex of-
ficio may dismiss it. and all procedings under it instru-
pass. 3 Wils 321. Salk 700. 1 Root 315. 316.

The same rule holds if the writ is iprid by improp
or incompetent authority. i.e. it is void.

In Com if the paymt. of the duty is not certified.
there are many defects which are fatal to a writ. as want
of date or impossible date misdirection &c 1 Show. 80. 1 Lev. 2
Cro Eliz 592. 1 Sid. 304 & Bac 43. And it is said to be
a rule in Eng. that a defective date cannot be amended
1 Show. 80. (Not however in Com). —

If the writ has a defective return. i.e. an insufficient
period of time between the date & time of return, or in other words
a defective time of return. it will abate. Salk 63. Cro Eliz 50
1 Sid 406. 2 Keb 401

As to C. L. If the Shffs return is defective
i.e. upon the face of the endorsement it will abate the writ.
but if the endorsement is good on the face although actualy
false. it will not abate at C. L. but an action may be institited ag.
the Sheriff, on the case for false return. Sho. 813. 1 Bl. Rep 393. Reason is. that such an
official act cannot be falsified except by an action instituted

By state in Com. the venue must be laid in actions before the Co. & Supr. Courts in the Co. & before single magistrates in the Town, when one of the parties dwells. -

for that wh[illegible] purpose — Not so in Lon. the return may be proved false in the original suit.

If property is attached & no copy left with Deft the writ abates unless there was service by reading; in which case it is good as a summons, but the property is not held by the attachment. 1 Roll 524. 128. 563. 2 Roll. 130. 346.

But under this law when real property is attached omitting to leave a copy with the Town Clk is no cause of abatement. for this copy is no part of the service relating to the Deft but such attachment will not hold the land against regular subsequent attachments or purchasers. Stat. Lon. 35 —

An other defect which is a cause of abat is want of venue: Want of venue in a Decl is good ground of demurrer 5 Bac 322. 7 T.R. 243. But now at C.L. laying wrong venue in transitory actions is no cause of abatement tho it formerly was. and although the court may order it tried where the cause of action actually arose at their discretion 1 Bac 35. 1 Sid 44. Salk 669. Comp 510. 1 Bro & Pul. 20. 245 3 East. 329. Lawes Pl. The term venue means literally vicinage. neighborhood. And in local actions false venue is good cause of abat. as ejectment. trespass qua. clau. frg. &c in these cases the venue must be laid in the same county where the cause of action arose. 7 Co 2. 3. 1 Bac 32. Com. Dig Abat. H 17. 1 Lev. 241 2 Sid 124 Another ground of abatement is that the action is misconceived as if Plff sues in Debt when the only remedy is by an action of Assumpt. Abbt 199. Lawes Pl. 106. Tidd 579. Com Dig. Abat. G. 5. This point has been lately determined in Lon.

(or advantage may be taken of it by plea to the action)—

Another cause of Abatement is that the cause of act. had not accrued at the commencement of the suit, advantage may here be taken under a plea to the action. as if the action be brot upon bond payable 1 Jan.y. & the writ issued at any time before the 1st Jan.y— or if one should sue as Admr. before he had taken out his title of admins. And if it appears upon the face of the declaration that the cause of action had not arisen the defect is incurable, and judg.t would be erroneous 2 Lev 197. Mod 199. Carth 114 Cro. Eliz 325 1 Show. 147. Com. Jo. 69. 70. 4. Co. 70 Com. Dig. Abat. G. 6 action E. These are the principal and perhaps all the different causes of Abatement

The Mode & Effect of pleading in Abatement—

A plea in Abat. regularly begins and concludes to the writ & in a few cases to the declaration. praying that it may be abated or quashed, 3 Bl. 303. Lawes 108. 9. 160. Tidd 584 5 Mod. 132. 144. 4 Bac 50. Except when a plea goes to the person of Dft as coverture. it then prays judg.t whether Dft. ought to answer Lawes 109 Tidd 584 I think a conclusion in the usual form would be good—

The character of a plea as being dilatory or to the act.n it has been said, is decided by its conclusion (without reference to the matter or beginning) 4 Bac 50. 11 Mod 112. this does not appear to be the true rule, the character is generally decided by the commencement and the conclusion. (varying the Latin & is generally adopted) and if the beginning and ending are both alike the character is determined. thus if it begin & end to the writ it is in abatement (without reference to the matter) if it begin & end in bar it is a plea

Where the plea gives the Plff a better writ it is after in abatement and this says Williams in the true criticism between bar & abatt. 1 Saund. 284 n. 4

in bar. 4 Bac 49. Laws 107. 145. 6 L. Ray. 593. Tidd 582. 591

When thus alike they are decisive. Suppose then the subject of the plea is in bar and it begins and ends in Abat. it is only a plea in Abat. — When the subject is good only in bar. if it either begins or ends in bar it is a good plea in bar L.d Ray 1018. 6 Mod 103. 2 Saund 209.

According to Chitty if the matter is good in Abat only & the plea either begins or ends in bar. it is good in bar, and provided it contains nothing to Dfft judgt is rendered in chief 1 Chit. Pl. 446 sed qu? if ag.t Plff it is good in abat only 2 Saund. 209. d. n.

I should think this criterion the most simple: when the beginning & ending differ reference should be had to the matter of the plea —

If the matter is good either in bar or Abat. and the beginning is in bar & the ending in Abat or vice versa Plff may treat it either as plea in bar or Abat. at his option 4 Bac 50. 1 Vent 136. 3 Mod 281

As to the forms of pleading in bar & Abat. commencement & conclusion see Laws Pl. App.x 3 L.d Ray 11. 53. 57. 92. 107 116.

A plea in Abat founded upon matter good only in bar is bad, & on the other hand. a plea in bar founded on matter good only in Abat is bad. 1 Bac 14. 86. 1 Mod 244. 1 Inst. 128. 129. 12 Mod 400. 4 Bac 46. 7. 50

But there are cases in which the matter may be pleaded in bar or Abat. as outlawry & in real actions damage. which may be plead in bar or to the disability of Plff 4 Bac. 50. 1 Mod 244.

The Deft may not plead two different dilatory pleas at once or two causes of abat. to the whole or to the same part of the writ: as that the Plff is an excommunicate & an outlaw. for duplicity is no more allowed in this kind of pleas, than in pleas to the action. tenet "in their time and place a man may use divers of them" says Ld Coke. 1 Inst. 304a. this rule of Coke, has been long misunderstood in Com. & Mass and in this state a pleader may now assign as many different causes of abat. as he chooses, (& at the same time plead to the act in Mass.) tenet it is duplicity at C.L. Laws 107. 8 Mod. 250 Carth 8. 9. 4 Bac. 51. 118 Doc. Pla. 6 1 Bac. 15. 3 & 4 Ann. And two dilatory pleas of the same class cannot be plead at once ins^t two disabilities of Plff Sts. Pl. 60 Laws 108 1 Com Dig Abat. (F) 3. 4. 5. 6. the event said in the case in Carth 8 & 9 that there is difference between a plea of outlawry in disability & other pleas in abat. —

When cause of abat. is plead & judg^t rendered upon it. error is assignable of this, as well as of judg^t in chief. but error cannot be brot on this until after final judg^t — i.e. the party cannot stop the proceedings here. because he may recover in the final judg^t.

But new matter of abat. is no ground of error unless pleaded in abat. if it is not so pleaded it is waived 6 T. R 766. Carth 124. 3 Bac 151. Com Dig 554. Doc. Pla. 5.

But this rule does not extend to cases where the objection goes as well in chief as in abat. or supports a plea in abat or bar. as form. covent. coventure is not a matter only of abat. 4 Bac 39. Ld Ray. 594 Stra 254. Stiles 254.

An apln a writ of sci. fa. on judg^t the defendant is not

allowed ~~to plead~~ to plead anything in abat. which he might have plead in the original action. 4 Bac 5. Salk 2. Bro Elij 2 83.5/5 Prat 363.

A writ may be abated as to part & remain good & stand as to the residue although the plea always the whole to be abated. Ex. action on two bonds. plea non-joinder of co-obligor as to one, or both, & prove only one - the writ proceeds as to the residue Saund 106.7. 2 Bro & Pul. 420.

A Dft may sometimes plead in abat as to part and in bar as to the residue. Ex. Asmpt. on two promises plea to one may be non-joinder - to the other non-Asmpt. auth. sup. -

As a plea in abat. does not regularly go to the merits of the cause, a judgt. on it is in general no bar to a subsequent action for the same cause. this however does not hold when the judgt. goes in chief, as in some instances it does on such a plea. 4 Co. 43 a 6 Co 7. 8. 46. 1 Vent. 170. Com Dig. Actions L. 4. 8 Co. 37. 98.

As to judgts. rendered on pleas in abat three rules are observed by way of distinction.

1st If the Judgt. is for the Dft. it is that the writ or Decln. (i.e. during the action. while it is made to appear to the Court) be quashed or abated. 4 Bac 51. Yelv 112 1 Vent. 22. 2 Show. 44

2d If Judgt. is for Plff on demurrer it is respondeat ouster that the Dft answer over or plead de novo 3 Bl. 303. 396. 2 Wils 367. 1 East 542. 4 Bac. 51.

3d If an issue in fact, on plea in abat, is joined, as it may be when the matter is dehors. and found for Plff Judgt. goes

in chief by C. L. that the Plff recover quod recuperet the same as if the Plff recovered vicit on a plea to the action 1 Bac 15. Yelv 112. 1 East 544 Ld Ray 594. Th. Ray 119. 4 Bac 57. [to die corroborat fals. dil. fl. &c.]

This latter rule does not hold in capital cases. 2 Hawk 334. 1 Bac 15. With respect to this rule in Com. it may [illegible] the practice. when an issue in fact is joined to the Court the judgt shall be only upon what shall arise on the ques as to its legality. — (1 Plowd 2 Ro. 309 11 Co. sub holos.)

If mere matter of abat is pleaded in bar, judgt in chief is rendered for Plff. Ld Ray 1020. 1 East 684. 1 Chit. Pl. 445

When the Plff is satisfied that the plea in abatement must prevail. he may himself enter what is called a cassetur bre. thus abating it himself i.e. praying that it may be quashed to prevent the cost & delay of judgt on it Lawes 166 Tidd 633.

It is a rule that a dft cannot demur in abat. that is, matter of abat. in the writ is no cause of demurr. or Demurr goes to the pleadings only and if Dft demurs thus demurr judgt will go agt him in chief. this is the general rule in all civil cases. Lawes 172. Gil. Com Pl. 208. Willy 410. 479. 6 Mod 198. Salk 220. 7 Mod. 97. 4 Bac. 130 1 Bac 15. Show. 91. Vor Plowd. 73 contra which is not Law. Seems in capital cases see 2 Hawk. 334.

After judgt of respondeat ouster the Dft cannot be permitted to plead again in abat. for he might thus go on ad infinitum — He is entitled to make one plea of this kind. But when the Plff has amended after judgt in favour

of the plea the Dft may plead de novo in abatement. Hob 126. 2 Saund 40. 2 Bac 51. Kirby 5.6

By the Com Law no plea in abat is to be received after a general imparlance or a continuance 3 Bl. 301. 316 (1 Bac) but after a special imparlance saving his original right of exception he may except by way of abat Tidd 131.

Neither can a plea in abat be received after the time for pleading in abat. is expired. by C.L. this is 4 days from the commencement of the term, (unless the cause arose after the rule was out.) after which the lawyers say the rule is out. Com Dig abat B. 18, In Com. the time in Sup. Ct. is limited to the third opening of the Court. that is the afternoon of the second day of the court - and in the County courts. the time runs until the jury is impannelled - St. Com 342. 1 Root 564

But when the law itself requires a continuance as in the case of foreign attachments. the Dft is allowed the same time in the second term as by the general rule is prescribed in the first

But to the general rule there is an exception when the cause arises after the rule is out. as if a feme sole should bring an suit & marry pendente lite & after the 4 days were out. the Dft in this case would be allowed to plead the coverture in abatement after the rule is out. 1 Bac q. 3. Bl. 316. Tidd 131. Lawes 173. Dac. pla. 297.

With these exceptions matter of abat cannot be pleaded in abat in any form after the rule is out. unless it goes also in bar when it must be pleaded in bar.

Com. D Pl. R

Deft. is not to be precluded from pleading it in bar because he might have pled it in abatement — Auth sup

I have now closed my observations on dilatory pleas

Pleas to the action —

These are divided into two kinds. general issue and special pleas in bar — both these are pleas in bar —

Issue is defined to be a single certain and material point issuing out of the allegations and consisting regularly of an affirmative and negation 1 Inst 126. a. 2 Bac 574 This is the definition of Ld Coke and has been pursued ever since his time. — The word "material" which he uses I think superfluous and improper for there may be immaterial issues

According to the antient rule there must be a distinct affirmative on one side and a direct negation on the other to form an issue 1 Inst 126 a. 1 Vent 213. 2 Bl. Rep 1312 8 T. Rep. 278. This rule however has been relaxed in one or two instances. (in gen'l rules however as) When one party pleads that J. S. was dead at such time and the other that he was alive at such time. this was held to be no issue. the latter should have traversed absque hoc that J.S. was not dead. 1 Vent. 213

It is improper to relax the old rule because it is the most simple method imaginable of forming an issue and this relaxation may lead to a looseness very inconvenient in the pleadings &c. Deft. pleads that he was born in France. the Plff replied that he was born in Engd it was held a good issue. Stra 1177. 1 Wils 6. and the Court

Diss. 593
Lewis 113

observed in this case that it is sufficient to form an issue if the second affirmative is so contrary to the first that if proved the first cannot in any manner be true, the proper plea in this case doubtless was that the Defts was not born in France.

In a writ of right indeed the issue is formed by two affirmatives and is called the mise not an issue the tenant says he has more right than the demandant & the demandant that he has more right than the tenant. The former presumed to be established 3 Bl. 305. Lawes 111, 232.3 2 Stra 1177. 8 The safest way is to close the issue according to the old strict rule which is most simple. only inserting "not" before the verb.

Issues in fact are either general or special. and to the modern issue Mr Lawes has added common issues to the division. but no other author speaks of common issues. Non est factum in covenant broken he calls common issues because it denies the and only and not the breach. this is the only instance of such an issue I think it a general issue if there is no covenant there is no covenant broken — Lawes 110. 113. 5 Bac 54. 8 T.R. 282. 4 Bac. 54.

The general issue is a denial of the whole Dec^n and of course puts in issue all the material allegations in it. 3 Bl. 305. 4 Bac 54.

A Special issue is one which is joined on some particular part of the Dec^n — for the Deft may relect any one material fact and deny that alone without putting the Plff to prove the whole. This would many times be very convenient — all the facts being necessary to support the

action. if one is found to disproved the case is lost. 1 Inst 126 (a) Laws 112. 113. 145. In our practise special issues are not joined as often as they might be with advantage.

When an issue is joined upon any of the pleadings after the Decl^n it is called simply an issue without more. the distinction between general & special issue is taken merely upon the Decl^n

"Not guilty" is the gen^l issue to any misfeasance whatsoever 4. Bac 54. To debt on simple contract "nil debet," on specialty non est factum — on Judg^t "nul tiel record." on acc^t "never bailiff or receiver." on asmp^t "non asmp^t." On warranty in contract non warrantizando vendedit. on warranty sounding in tort. "not guilty" To replevin "non cepit." to disseisin. "no wrong no disseisin." See 3 Bl. 305. 4 Bac. 54 Cro Eliz 257. 3 Mod 324. Ld Ray 1500. 2 East 446.

I have observed that to an action on simple contract "nil debet" is the proper gen. issue - to an action on a penal Statute, it is also the appropriate gen issue though "not guilty" is good 1 T. R. 462. Roy 56. Cro Eliz 257

"Not guilty" was formerly holden a good gen. issue to asmp^t for it was called trespass on the case. but it is now determined to be not a good issue. it is however aided by verdict. it is bad upon demurrer 1 Lev. 142 Str. 1022 Esp Dig 167. 4 Bac 58. 84. To debt for rent the proper general issue is "nil debet," yet "riens in arrear" is also good. Comb 518. Brownl 19. but nil in arrear is not good gen. issue in action on covenant for rent broken. the act^n is founded

upon the covenant and the plea assigns nothing in avoidance so in an acc.t of debt on bond nil debet is not a good gen. issue for it admits the bond. but if Plff joins issue on this plea and does not demur as he should do. the Deft is let in to any defence that he can prove to the action. and which he might have made to an action on a simple contract. & as Plff thus lets the whole at large. Deft may demur to the action & shew something vicious in the bond which prevents any obligation arising from it and this is all left to the jury — Plff should always in such case demur. 1 Chit Pl. 478. 5 Esp. 38. Com. Dig. Pl. E. 42. 2 John. 183. 8 John. 82

Gen. issue issues always to the count and not to the writ; for it is a plea to the action & In acc.t the writ charges the Deft as receiver generally, and the count as receiver specially by the hand of &c. the "plea never receiver" or gen. issue denies only that Deft was receiver by the hand of &c. and to this last the parties are confined. 1 Inst. 126. 2 Bac 54.

The general issue like all other issues in fact, concludes ingeneral to the country and is tried by the Jury 1 Inst 126 (a) 3 Bl. 313. 15. This however is not universally the case although at present it is almost so. for there are other modes of trying issues, in fact as by C. L. as by record, inspection and certificate which are now occasionally used. also by wager of law & wager of battle 3 Bl. 330. & onward.

The gen. issue of "nul tiel record" always concludes with a verification. for the record is matter of law to be shewn to the court. the opposite party affirms over that it is true & the

+ except in one instance when a Lessee holds over & refuses to quit. -

record and prays the court to inspect. Laws 146. 148. 226
2 T Rep 443. 2 Wils 113. 14 5 East 473. 1 Bro & Pul. 411.

But the proceedings of foreign municipal courts are not strictly records. (but those of courts acting under the law of nations are) — If a foreign judgt then is plead it must conclude to the country 5 East 473. Dorig. 1. 6. Ch. Pl. 537. 572.

The rule is the same, when one pleads a record lost or destroyd. as to the conclusion. "nul tiel record" would be no plea at all. it must conclude to the country & be tried by the jury 5 East 473.

By a Stat. in Con the parties in all civil actions may by agreement put their issue in fact to the court. in which case the plea must conclude to the Court St. Con. 267 (reciting that it is doubtful &c) and generally all issues before a single magistrate are to be tried by himself as he is allowed no jury — viewing to single justices —

The form of tendering an issue in fact

If the traverse or denial comes from Defdt he concludes thus "and of this he puts himself upon the country for trial" if from Plff. "and this he prays may be inquired of by the country" 3 Bl 303. Co. L. 126 a. 4 Bac 54 If however the issue tendered by the Plff is in negative terms it may conclude in the former manner and the conclusion will be good on special demurrer 10 Mod 166. In either case the issue is joined by the opposite party's adding "and the Plff (or Defdt) doth likewise" This is called adding the similiter. 3 Bl. 315. Laws 147. 8 Co. Lit. 126 a

The slightest grounds are frequently used to avoid this rule which makes the omission fatal. "&c" was designed to be intended as a similitude for any [illegible] to summon. The case in Hay does not appear the Count the scienter is no part of the pleadings. Even posting shows that [illegible] but it does not appear upon the postea in Ley?

and when they are of the substance they put in issue the circumstances attending the principal fact as time, place, manner &c. & must be proved.

"When in law. an issue in fact is put to the court the party tendring it must expr in the conclusion. that it is done by a graument Ev. of this by a graument he puts himself on the court for trial. & if it is bad.

It has been often decided in Eq. that the omission of a similitur is not aided by verdict. omission of similitur is in Eq. aided by verdict. (Huntington vs Babcock) 2 Doug 392 Stra 641. Cowp. 407. 1 Saund 319. a. n. 6 3 Burr 1793. 2 Saund 319. a. n. 6 1 Chit. 570. 1. 2. (2 Day. 392.) In Eng. may be amended."

An issue always closes the pleadings and when well tendered must be accepted. 4 Bac 55. 3 Bl. 314 Co Litt. 126. a 1 Saund 338. Comb. 86. Carth 86. If not it may be demurred to. i.e. if not well tendered

The words in "in manner & form" which are generally used in tendring an issue in fact, are omitting of the substance of the issue. sometimes words of form only Sa. 120 Stra 317. Ev. Gen. issue pleaded to a battery. I said to have been with swords clubs &c. "in manner" is not put in issue

Seems when they are originally material. Ev. Defft pleads profert by and. Plff traverses it modo et forma. Here a profert without and tho good at C. L. cannot be proved. a variance Co. Litt. 281. (a) 4 Bac. 56. Litt sec. 483.

For the and is of the substance of the issue. in the former case. the words "modo et forma" tho generally used are not necessary Comb. Sa. 121. Com Dig Pl. G 1. except when the words alledged to attend the principal fact are material.

These formal words do not put in issue. the circumstances attending the principal matter traversed. as time

It is impossible that an issue should be immaterial when it traverses all the allegations on the other side. so that if no material allegation may traverse will to-fest the action.

A negative pregnants is an allegation which leaves room for an affirmative implication. An affirmative pregnants leaves room for a negative implication.

Hen. Dict.

notice the distinction between a negative pregnant & an immaterial issue. the former includes what is material as well as what is not so, thus in the example given, it includes as well the existence as the date of the lease; this is immaterial quoad it includes the date. it is however aided by verdict. An immaterial issue, one that is strictly & intrinsically is not aided by verdict. 2 Saund. 319.a Carth. 371.

place, manner &c. unless they were originally material and necessary to be proved as laid Ld. 49. 120 Stra 317. 2 Saund 319. n. 6.

An immaterial issue is one which leaving a material allegation on the other side, is taken on one which is immaterial and does not decide the merits of the cause 2 Saund. 319. a. n. 6 Gilb Com. Pl. 147. 1 Lev. 32. Cro J. 434. 582 Ex. on matter of mere inducement or aggravation on matter immaterial, inducement, surplusage &c. It is not aided by verdict Ex. in Assm. V. ag.t Ex.rs he pleads that he (instead of testator) did not promise 2 Saund 319. a. n. 6. Cantt 371. Replication awarded 4 Bac Ab 1 Vin. 338. 3 Bl. 395. 2 Vent 190. Comyns Rep 48. 2 Mod. 127. "amount of judg.t" 2 Saund. 319. 1 Chitty 632.

An issue on a negative which includes other sufficient matter. (which constitutes a negative pregnant is bad. or on an affirmative pregnant) — Ex. plea of "no cause since the date of the writ." Replication "not his said since the date of the writ" &c. this is a negative pregnant. 1 Saund 126. 303. Cro Jo. 87. 312. 5 Bac 201. 1 Roll 88 (at C.L.)

Formerly this was holden to be a radical defect. but it is now cured by verdict by St. 32. Hen. 8. 2 Saund. 319. n. 6 Gilb Com. Pl. 147. Cro. Jac. 87. whether the verdict is for Pff or Defts. and such pleading is good sufficient when the negative or affirmative included in it is not sufficient to maintain what is alleged on the other side. L. 114

A negative pregnant it seems is ill on special de-

Whether a negation or affirmation pregnant is ill on a gen: demurrer does not seemed settled — A negation or affirmation pregnant is good pleading when the negation or affirmation implied is not sufficient to maintain what is alleged on the other side: as in a plea of usury Deft pleads that it was covenanted, agreed that Plff should have 10 p.r ct. & Plff replies that there was no such agreement to pay 10 p.r cent. this is a negative pregnant & good pleading, notwithstanding there was more reserved than lawful Int.st for this does not prove that 10 was reserved: as he pleaded that the reservation was of 10 no implication but than that will be allowed. Lawes 114 The traverse ought to be that it was not covenanted agreed in manner & form &c this would avoid the negation pregnant. —

manner only. 4 Bac. 98. 1 Bac 94. 5. Dw? 2 Saund 319. n. 6
Gil. Com. P. 147. 153. as to gen.l demurr.—

An informal issue differing from both a negativing &c. immaterial issue &
is one taken on a material allegation but not rightly taken in point of form. this
is aided by verdict. 4 Bac 56. 2 Saund. 319. n. 6. 3 Bl. 395.
1 Bac 103. Carth 371. 1 Lev. 32. Cro Eliz 227. 2 Mod. 137. 10
Mod 19. In both rules Ex. making the day and place
part of the issue (on a material point) when they are
immaterial. 2 Saund. 319. n. 6. (post) (traversing a neg. allg.n with an absque
hoc.) The general issue, covers the whole declaration generally
but there are cases where the general issue is improper. where the
facts alleged in the declaration are not intended to be de-
nied. thus when a contract is sued upon which is void that
incapacity of the party who made it. Deft. may plead the gen.
issue and give this incapacity in evidence: as written then is no al-
legation of the Def.s denied. The law considers the bond or
contract as a nullity & in point of law it is not the
act of Deft. 1 Pow. Con 97. Salk. 7. 2 Bl Rep 1082. 2 P.Wms
145. 3 Wils 228. 6 Mod 311. 12 Mod. 109. Gilb. Ev. 162.

But when a deed sued upon is void in its own nature & not
from incapacity, the gen. issue is not the proper plea. Ex aboud
given on usury. the usury must be pleaded specially & not given
in evidence for the instrument was the act of the obligor tho
not being under any incapacity at the time he made it.
Such the same when the bond is only voidable. 2 Bl. 292
Esp. Dig 223. It is the act of Def.t when it is only voidable

When the bond is voidable there an incapacity
not absolute but qualified. the general issue is not the

Cf 2 Co Lit says the manner of making a special plea [illegible] is of no validity

The true meaning of this rule is that this plea does not in its own nature involve any other than matters of fact. The rule is altered in many cases by Statute.

proper plea to avoid himself of that incapacity Ex. a bond given by an infant he must plead infancy specially 5 Co 119. Esp. Dig 223. Plow. 66. Hob 72 Salk 175. Stra 498 3 Burr. 1805 — And it is a genral rule of C.L that if a specialty is made void by stat, the special matter must be pleaded & cannot be given in evidence under the genral issue. as in the case of an usurious bond. for the defence is inconsistent with the plea of "non est factum" and it is so when the bond is void at C. L unless void through obsolete incapacity. Gil. Ev. 163. 5 Co 119. Hob 72. 2 Bl. Rep. 1108. Esp 223.4

Lots of the real & and, ransom, want of compleat delivery, or any alteration, are defects that may be taken advantage of under the genl issue of "non est factum" and no need of special pleading, 5 Co. 119. a. b. 11 Co. 27. (a) Esp Dig 223. 4.

Under the genral issue of non est factum. matter of fact only can in issue. generally speaking. this is not however universally true as in bond executed by feme covert. the fact of execution is not in issue Esp. Dig. 224.

With respect to action in genral as to defence admissable & not admissable under the genral issue. the rule of C. L. is this. if the defence is consistent with the genl. issue, it is admissable otherwise not. Suppose 'non est factum" pleaded to a bond. Deft cannot give infancy usury &c in evidence because they are inconsistent with the issue. but he may give in evidence an alteration of deed. because the deed cannot exist without a sealed

Stile however it is a genral rule that in actions of Debt

The plea of non assp. in this cose, ~~that~~ doe's not mean Deft. did not promise actually for this is taken for granted that he did not: it only denies that Deft. is not liable at the time of plea plead. Stra 498.

Or in other words, which do not deny the duty or obligation. (Stoke v. Taft. 566. accord & satisfaction must not be pleaded)

Assumpt. any thing, in general which shews that Plff. had no right to recover at the time of plea pleaded, may be given in evidence under the general issue and the reason is, as the promise laid is but a legal consequence of the duty stated, whatever disproves the duty disproves the promise. — As when the defence is infancy he pleads that he did not assume & promise & the meaning of the plea is that he is not liable, therefore he may give any thing in evidence to shew that he is not liable, this defence are not inconsistent with the true meaning of the plea. Stra. 419 4 Bac. 601 3 Burr 1353. 2 Burr 1010. Ld. Ray 787. 2 Wm. Bl. 1143. Doug 101 108

But does this rule hold as to Ex. pro Assumpt.? If ever there is an ex. prop promise & one of the same, the rule is that he can, but the rule has been extended to this case by mistake in my opinion and I look upon it as a departure from principle. — 1 Lev 142. Salk 140. Bul. N. P. 51: 2 (1 Mod 210 contra) Chitty bills 197. 8. Ld Ray 566 5 Mod. 18 — On the other hand the St. of Limitations. tender. set off. bankruptcy & the accord & satisfaction must be pleaded specially when used as defences to Assumpt. even in this trip said are matters of law which do not go to the gist of the action. but go to destroy the action or remedy only. & are not like the other defences which are given to extinguish the duty. There is a confusion on this subject. from extending the rule to ex. pro Assumpt. Chitty. Bills 198. Esp. Dig 127. Ld. Ray. 153. Tidd 375. 1 Saund 283. n. 2 — 3 Burr. 513.

In debt on simple contract Deft may rely without

That the stat of limitations may be given in evidence under a plea of Nil debet. E. v. Parsons said was merely a dictum of L.C. Holt & Raddins been overruled. 1 Salk. 278. 1 L.d Ray. 153. 2 Mass. Rep. 87. 1 Chit. Pl. 476 Esp. Dig. 262. Bl. A. 702. Burn. 2630. 1099. Doug. 629. L.d Ray. 389. 421. Comp. 548.

(b) But in arrest of judg.t the St. of frauds &c & limitation of actions will not avail. for said the B.r when the jury have found the verdict it is no reason for arrest that they had not sufficient evidence — this is Bon.t Case. 2 Swift. 215.

Stat of limitations under the genral ipsm, the pltf being in the prisnt time, that he owes nothing. A release may also be given in evidence in action on simple contract, for the same reason, it is consistent with the ipsm & supports it. 2d Ray 566. Salk 278. 2 Lev 215. 1 Saund. 283. note 2) Comp 588 2 Am Bl. 143. Doug. 108.

In the action of Asmpt. Deft may take advantage of the Stat of frauds under the gen. ipsm & Pltf must prove the promise otherwise than by parol. (6) 2 Lev. 214. 1 Bro. Ch 92

In actions of Asmpt. Deft may give in evidence anything which shews that at the time of plea pleaded he is not liable this rule is peculiar to Asmpt. & does not hold in actions of tort & much less in actions on specialties, thus in trespass Deft cannot give a release in evidence with can be pleaded in ever under gen. ipsm on this, as it would be inconsistent In cases of tort every matter of justification must in general be specially pleaded, because inconsistent with the genral ipsm 4 Bac 60. 2 Rolle 682, Esp. 317 Hob 174. 5 Comp 478 Bul N.P. 17. — and upon matter of law to the wrong jurisdiction. 4 Bac. 60. 5 Mod 252

On the other hand, every defence which cannot be specially pleaded may be given in evidence under the genral ipsm: this rule is essential to the justice of legal proceedings Lawes 111. and is universal.

These rules of the Ld. as to what may & may not be given in evidence under the gen ipsm. have been attended considerably by the Statutes of the different states. In Con. The Deft may give in evidence under the gen ipsm, in any species of civil actions, any defence of whatever kind, that

* That Plff may have an opportunity to bring Defts within the proviso by means of replication.

destroys his liability except some act of the Plff by which Defdt is acquitted 1 Stat Ev. 342. by the act of Plff which is the only exception is meant some act which operates as a discharge of the right of action once existing as when accord & satisfaction & an award of arbitrators. so also a release necessary must be specially pleaded. there are dangers arising from the act of Plff.—

The act of Plff antecedent to the alleged cause of action may be given in evidence under the gen'l. issue. it serving as matter of justification, as a license 2 Swift 208. Not so by C.L. because the the license makes it no trespass yet he shews the license to an improper jurisdiction viz the jury. 4 Bac. 60. Bull. N. P. 151. 2. Those acts which the Com Law requires to be specially pleaded are ex-post-facto & In the case of antecedent license no cause of action ever accrued 2 Swift 208.

And I trust that any other act of the Plff which shews he never had a cause of action may be given in evidence under the general issue. as disproving one of the times. these however are not the acts of Plff. also many because it is an act which precludes the demand from ever accruing. Kirby 239. 3 Day 508.

In Con. the Stat of limitations may be relied upon under the general issue in actions sounding in tort as well as in actions of debt this is contrary to the rule of C.L. which directs that in trespass trover slander &c. the Stat must be pleaded specially 3 Bac. 518. 4 Bac 61

Mr Swift says that in Con. the Stat of limitation can-

Special Title

not be given in evidence on a Sumpt. because says he it contradicts the general issue is repugnant to it. 2 Swift 215 But in this state that is not an objection. & Mr Swift's assertion that it must be pleaded specially is not law.

And in Con. in an acct on both debt or simple contract a release may be given in evidence under the gen. issue although it is plainly an act of Plff acquitting the Deft from the right of action which once existed, because tho it comes within the letter it does not within the spirit of the stat. The Stat 32 was not intended to prevent Deft. proving under the general issue what the C.L. admitted him to. 2 Day 272. Salk 278. Comb 588. Ld Ray. 566. Comp. 588.

It is was decided in our Court of errors in 1804 that in Ind^t Aff^t a release could not be given in evidence under the general issue. in Day Brace vs Cattin, this is in my opinion abhorred to the spirit of the act 2 Day 272.

The Deft instead of pleading the gen issue may deny any single material traversable allegation which goes to the gist of the action & conclude to the country. This is a special issue & tho not very common are very convenient for when all the facts are necessary to the cause of action, overturning any will save the Plff all his labor on the other part of the case 1 Saund 112.135 172.3. Com Dig Pl. E 1. Yelv 105 1 Inst 282, Doc Plac. 203 Gibson. Pl. 61 4 Bac. 62.67 And in this case the reverse or any thing ought to be pleaded as an answer to the whole declaration & if it is not the matter must be answered in some other way, but when it is plead to the whole it is not necessary to make any other answer than the issue.

A special plea (i.e. a plea) alleging new matter; amounting to the gen issue is regularly inadmissable. for it lengthens the record unnecessarily and tenders questions of facts to the court: as in Trespass the Deft pleads an alibi or that the freehold belonged to another Hob 127 Bro Ch. 157. Bro Ely 268. 329 3 Lev. 21 3 Bl. 309. 10 Co 95. 1 Vent 224.

For a definition of this plea. A special plea is said to amount to the general issue, when the special matter alledged in it goes in denial of the allegations of the declaration and how I would lay down this rule. viz. that nothing ought to be specifically pleaded by Deft in general except new matter the legal sufficiency of which it may become necessary for the court to determine. In the cases before put there is no new matter the legal sufficiency of which goes to the court.

In Bro. title is specifically pleadable by Deft in an action of trespass quare clausum fregit. but by C.L. it could not be specially pleaded without giving colour to Pltff Stat Bro 225. 3 Bl. 309.

There are two or three cases of exception to this general rule of C.L. that a special plea amounting to the general issue is inadmissable. 1st A special plea amounting to the general issue (which is matter of law) is good at C.L. if it contains special matter of justification. As he is obliged to connect his defence with special matter of justification & therefore it may be pleaded. 3 Lev 40. Bro Ely 268. 1 Saund 298 note. Salk 107. 8. Hobt. 127. 295. Com Dig. Pl. E 17. 5 Bac. 202. Esp. 318

2d The court in its discretion may allow such a plea in certain cases. as it says Hobt. if the matter is "such a matter "as to breed a scruple in the breast of the justices" i.e. the justices Bro Ely 871. 2 Mod. 168 274 4 Bac. 62.

By giving Colour to Plff is meant alleging in plea some fact matter
of title in Plff in order to justify a statement of 4 Bac. Ab. 134
Defts title under the pretence against of Law in the 5 Bac. 202
companion of the title as they appear on the record. 3 Bl. 309
Lawes. 126. 7. 10 Co. 88. 90. Cyl. 5 Bac. 208. Ch. J 499.

3 In trespass & ejectione a special plea of Title may be pleaded &
if it gives colour, then on the exception — There is however
an apparent contradiction in the books, on the question whether
such pleading is a good cause of a special demurrer or merely
of a motion that the Deft be compelled to enter a general issue:
there are authorities on both sides — I think the true rule is
that such pleading is not cause of demurrer, but that the
court may on motion order the Deft to enter the gen. issue &
if Deft will not, as the Ct cannot enforce their order otherwise
must renew judgt on nil dicit. 10 Co 95. a Co 6th. 157. 112
Co Eliz 871. Jenkins 306. Contra Hob. 127. 1 Leon. 178. Co Pl. 165
Co Litt 303 b. 2 Mod 274. 5 Mod 18. 2 Day 231. not demurrable —

I have no doubt but if the Court refuse to allow the plea and the
Deft will not plead the gen issue but joins in Demurrer, judgt
must go agt him. the Plff in this case may take judgt on
nil dicit 10 Co. 94 Jenk 306. 5 Bac 202. Co Pl. 165. 319. 2 Bac 61.
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But a special plea alleging facts which would support
in evidence the general issue does not necessarily amount
as a plea
to the general issue . . . . . as in debt on simple contract
a plea of release may be pleaded specially or it may be given
in evidence under the gen. issue although it does not deny
the Decl. — In an action of Aspt brot agt an infant, the plea
of infancy may be given in evidence & will support the
gen. issue or it may be pleaded specially. 2 Roy 88. 9. Salk
394. 5 Mod. 18. Chit. Bills 197. 8. Laws 112. Tidd 591 599. 6 Watts 356

You have only to bear in mind that such pleas do
not deny the facts alleged in the Decl.

No plea which admits that once was a cause of action or admits that the allegations are true, amounts to the gen. issue. although the facts pleaded might in evidence go to the support the general issue. 2 Ld Ray 88. 9. 566. 787. 6 Mo Eliz 871 Carth 188. Salk 394. 1 Inst 282. 3. As in act. of debt on a bond signed by a feme covert, the coverture, or infancy or infancy may be pleaded specially or given in evidence Lawes 129. 2 Ray 88. 9

And in pursuance of this principle it is customary Law in Cont. to plead specially other defences then acts of the Plff shewing as a discharge. although these other defences might be given in evidence under the general issue by an Statute.

There is a kind of plea called a "special general issue" or as it relates to deeds it is called a "special non est factum"

A plea stating special facts which go to prove the general issue & concluding with the gen. issue is good. as that the deed delivered to S.S. was an escrow. & so not his deed. at the time of delivery the Defts was a feme covert & so is not her act. so that it is altered. interlined. or seal broken off & so it is not his deed. Gil. Law Ev. 164. 166. Plow. 66. 1 Vent 9. 216 Salk 274—

Lord Holt says that all special non est factum are impertinent meaning no doubt that such pleading subjects the Deft to the onus probandi— 4 Bac 62. 89. 6 Mod. 218. But Deft chooses onus probendi for some other advantages—

The authorities differ as to the mode of conclusion for this plea. some say & I think correctly that it must conclude to

The advantage in this kind of plea is to confine the proof to a single point
and also it gives fair notice. & also a question of law may be Gilb. Ev. 164.5
raised under it.—

th country. 3 Keb 26. Plow 6°. 1 Vent 9. 210. Salk 274. Esp. Dig 222. 4 Bac. 62. 89. It may however conclude with a verification Moore 30. Noy 112. Gil. Law. Ev. 164.5— the form matter stirs me as th correct one. for a conclusion with a verification would alter th character of th plea entirely th very fact of concluding with a verification alters it. and it would become a special plea amounting to th gen: issue — & no longer a gen: issue with an issue

although the plea ought to conclude to the country th Plff may plead over & take issue or traverse th special matter preceding th conclusion as that Deft was not form committed and then she is bound to prove it— in this however there can be no possible use Gil Ev. 164.5. for that is th only (Salk 274) thing in issue when it considered to th country

This plea is answerable as if Deft: should plead infancy & so it is not his act— this should be pleaded specially. Salk 274.5. So always when th special matter is not sufficient in law to support th Gen: issue.—

Antiently if a deed (executed in point of form) was originally void by reason of something intrinsic as Cov: or because of something ex post facto as duress interlineation &c Deft could not plead th gen: issue. except with an issue. but th rule is not so now. 5 Co 119. Gil 163.4

Of Special Pleas in bar.

Pleas to th action of th second class. special pleas in bar or special pleas to th action —

This plea you will remember is defined to be one which admits th facts stated in th Decl: but avoids them. — as if in an action on bond. th Deft pleads a release. this admits th

execution that avoids it. 4 Bac. 2. Dyer 66. Laws 37. 8. 115. 129

It is remarkable that this definition should be so generally given in the books. For although generally yet it is not universally true that a special plea in bar admits the allegation in the Decl^n^ there are instances in which the material essential parts of the Decl^n^ the very gist of the action is traversed. which in point of law is equal to a denial of the whole. — the Plff however is not bound to prove what is not traversed. — now that such special pleas occasionally occur see Hob. 104. 2 Vent. 79. Cro Eliz 30. 418. Laws 116. 121. 118. 148. examples of this are very numerous —

I should define a special plea in bar to be one which alleges special matter in bar of the action. every plea which corresponds with this discription is a special plea in bar & vice versa.

This plea regularly admits all traversable allegations, which it does not traverse & is in avoidance of what it admits. 4 Bac. 2. 73. Salkeld 91. —

There is however one particular plea in bar which does not strictly deny nor admit & avoid. viz the plea of estoppel. which is not strictly denying in form although it is in fact — it goes to shew that Plff is precluded from averring the facts alledged. & so whether they are true or false is perfectly immaterial, as a former recovery a matter of record. Laws 38. 130. 140. 146. 158. 161. 170. 3 Bl. 308. Willy 13. 3 East 346. 365.

It is however a rule in pleading justification that Deft must expressly admit the fact he justifies notwithstanding the general rule considers all allegations admitted if traversable & not traversed

as in an action of assault & battery. (without denying or confessing & avoiding) Deft. justifies an act that does not constitute a battery the plea is ill. this if it means anything amounts to the general issue specially pleaded which is not allowed. it is not a denial. matter is ill justification. it is only a justification of a fact altogether distinct from the allegations of the Decl^n 1 Saund. 14 note 3. where is the rule stated as in. 1 Saund 28. note 1 3 T. R. 298. 3 Salk 394. Carth. 380

Either party may expressly admit an allegation or matter pleaded by the other side which is in his own favour & make it a part of his own case - I cannot see the use of this because the matter is already on the record & acknowledged Laws 143. L.

A plea in bar, according to my definition, advances new matter, or special matter, and is usually, tho not always, in the affirmation of a negative covenant. the instances of this kind however are rare 3 Bl. 309

Every thing is new or special matter except a positive denial of the allegations on the other side and this it is that distinguishes a special plea from the gen^l issue - Fraud Infancy &c.

In consequence of this every special plea must conclude with a verification & not to the country - it cannot regularly conclude to the country because unless a proper issue is tendered each party must have an opportunity to answer in any of the three ways viz by denial. demurrer or confession & avoidance - it is the regular form of ending the pleadings open. as otherwise they would be closed. 1 Saund 103 n. 2. Laws 150. 159. 3 Bl. 309. 10 Comyns. 575. 2 Burr 777 2 3 Burr. 1725. 2 Stew. Rep. 363. Doug. 58.

There is a single exception to this rule, with which however we have no concern, introduced by Stat 5th Geo 2. by which Counterplea may be pleaded specially & a conclusion made to the coun-

try. Laws 115. 145. 224. 227.

Pleas in the negative merely need not close with a verification, but Deft may (may) demur without it, (the gen. and if thus leave the pleading open) For a party is not expected to prove a negative. Willy 5. Laws 145.

On the other hand, pleas which form a complete & proper issue must conclude to the country (provided they are triable by jury (for some pleas are not triable but record) for an issue when properly taken closes the pleadings. Ray. 98. Cartt 58. Laws 145. 3 Bl. 309.

When Deft. alleges distinct matter to each or diff. part of the Decl. he may conclude each distinct part with a verification, or all the parts with one genral verification - as in Act. for £100. he may plead (say) as to £50 & as to the remaining £50 tender or release & he may verify each separately or conclude the whole with a genral verification. 1 Saund. 338. note 5. 339. n. 1 Salk 298. 312. Cartt 43.

I have observed that all pleas admit of course all allegs which they do not deny, hence to an action on bond nil debit is ill; because, it does not deny, (mind) it admits the execution of the bond, the original indebted mp and assigns nothing in avoidance. 1 Saund. 39. note 3 Lev. 170. Ld Ray 1500. 2 Stra 778. 780. 5 Burr. 2588.

(As to the requisites of a special plea in bar. ch P. 507.

Ld Coke's rule is so general & inclusive as to be nugatory, my lord says "that every Deft must plead such a plea as is pertinent & "proper for him according to the quality of his cause, estate & interest". Co Lit 285. 303. 4 Bac. 83. — without further noticing this, I would observe that every special plea must contain issuable matter, else it would be of no use & immaterial. 2 Willy 74 Laws 137. 8. as if in act^n on contract Deft pleads that he is & always was ready & willing to perform

So in trespass if 2 d.s plead a release given at a certain time he must plead
somthg. in answer to all subsequent times. as by traversing all others
1 Saund. 337. Hob. 636.

it is ill. for his willingness is not triable — it is immaterial

Every plea in which fact and law are so blended together that they cannot be separated is ill — thus when an act. was brought for recovery of goods Def.t pleaded that he had a right to the goods of all felons within such a district that the goods of felons were his — it is ill, he should have pleaded his grant or patent i.e. the special matter on which his right was founded & this might have been traversed or demurred to, otherwise it was impossible to traverse without making an issue in law Laws 138. 9 Co 25 a. Ent. 530.

A plea in bar to the whole declaration must answer the whole gravamen or cause of action or it is ill for the whole — thus if in an action for assault & battery & wounding Def.t pleads justification which goes only to the ass.t & batty, it is ill for the whole and the jury must assess damages for the whole. he should never plead distinctly to each, and the reason is that an entire general plea cannot be divided 1 Saund 28. 268.n 2 Saund 50. 127. 210 b & c. Cro. Eliz. 268. 3 Lev. 379 Hob. 104. Com. Dig. Pl. (E) 1. Esp. Dig. 318. Ch. Pl. 506.

The same rule holds as to the subsequent pleadings. thus if a replication is bad for part of plea in bar, it is bad for the whole 1 Saund. 337. 28 n. 2. 2 Saund 127 1 T. Rep 40.

This rule however does not prevent Def.t from making different pleas or answers to different parts of the Dec.n as you observed in the case of ass.t for $100 before noticed — In that case no one particular part of the plea answers to the whole declaration - each part imports to be an answer only to a distinct part of the Dec.n and does not come within the rule of pleas in bar which import to be an answer to the whole declaration —

From the former rule it follows that if the

matter pleaded as an answer to the whole declaration is in law an answer to a part only. the plea is bad for the whole - thus if to debt for £100 Defᵗ pleads that he has paid £80 in full of the Pltffs demand and he pleads in answer to the whole decl^n that which amounts to an answer only to a part — Pltff may demur. Ch. Pl. 510.

If matter which would be sufficient in law to answer the whole decl^n is pleaded as to part or importing to answer only part it is ill - thus in a Sp^l ass^t for £80 Defᵗ pleads pay^t of £100 in part of Pltff's demand. - he only applies to part what should be applied to the whole and the Court will not make a plea for him nor apply it — 4 Co. 62. 1 Saund 28. Cro. Eliz. 268. 330. 434. Cro. Jac. 27. Lam 135. 6. 171. Salk. 179.

Nay also if in an ass^t ag^t Bailee for goods to be kept or conveyed. he pleads a discharge from keeping them only, in answer to the whole which is in law an answer only to a part it is ill — Hob. 28. 4 Bac 88. Cro. Jac. 676. 2 Roll. 414.

But there is a distinction to be observed with regard to taking advantage of this kind of pleading.

If a plea imports to be an answer to the whole tho' it is in law a defence for part only the Pltff may demur. Salk 179. Ld Ray. 331. Stra. 303. 1 Saund. 28 n. 3. Ch. Pl. 510

But if it imports to be an answer to part only & is good for part only in law it is a discontinuance of the defence. the Pltff must take judg^t on nil dicit. for he is not bound & ought not to accept an answer to a part only & therefore may treat it as no answer. If he were to demur he would discontinue his own suit. 1 Saund. 28. n. 3. Salk. 179 Ld Ray 331. 841 Stra. 303. Gil. Com. Pl. 155 158. 4 Co. 62. Chit. Pl. 509.

Defts pleads," as to the Ruping. Pltf discharged him from Ruping & carrying."
in the case above

For a plea which, the gist of the action answers all aggravations.

But suppose that this plea in bar imports to be an answer to part only when in law it is a good defence to the whole - now according to the rule just laid down. this plea would be ill. - but the authorities differ as to the correct way of taking advantage of it. 1 Saund 28 n 3 Lans 136. 2 B & Pul. 427. 1 Sel. N.P. 4. 4 Leo. 62. Stra. 303. you will find these authorities irreconcilable. some say that he ought to demur. others that he must take judgt on nil dicit — I should think he ought to take judgt on nil dicit for his claim. ~~is not~~ profitedly, if not answered - it imports to be an answer to a part only which Plff cannot accept.

If a plea thus begun simply answering a part only, proceeds as an answer to the whole, the Plff may undoubtedly demur for the repugnancy & inconsistency in importing to be an answer to a particular part & to the whole — 2 B. & P. 427. Lans 136. — Chit. Pl. 510.

I observed that every special plea in bar must answer the whole gravamen - but this rule does not require that the Deft. should simply answer such part of the declt as are not material and do not constitute the gist of the action. as matter of inducement or aggravation. and as in actions for trespass on the person it is usual to add a claim alledging it also enormia. now this it is not necessary simply to answer. & of matter of inducement &c the rule is the same for. it is only explanatory or introductory and not necessary to the cause of action. 1 Saund. 28. n. 3. Ch. Pl. 510.

Since it has been determined in an action of trespass for breaking & entering my

house & turning the Plff out. as the text, to wit, turning out the Plff is not necessary for the cause of action is not of the gist. it need not be so plainly answered. so that an answer to the allegation of breaking & entering is fully sufficient — so that a justification of breaking & entering would prima facie be a good answer — But if the matter alleged as matter of inducement be a substantive ground of action. Plff may avoid this matter of justification by making a novel assignment. as in Dec. ag^t Plff. for entering his house destroying furniture &c the Deft justifies the gist, to wit the entry by reason of criminal process. then the Plff. makes a novel assignment of destroying furniture and beating servants & in his replication makes that a substantive ground of action which in Dec. was only matter of inducement or aggravation. 3 T. Rep 292. 1 T. Rep 479. 636. 1 Hen Bl. 555. 3 Bl. 311. 2 Wils 20. 1 Saund. 28. note a

. . . . . You will find in Blackstone. 3 311 an imperfect description of a novel assignment —

A Novel assignment consists either in alleging specially in the replication (in answer to an evasive plea) with all necessary circumstances, that which is stated generally in the Dec. or it is alleging as a substantive ground of claim that which appears on the Dec. to be only as matter of aggravation. — As Justice Blackstone gives only the first part preceding the word "or" as for the remainder see Laws 70. 163. 197. & for the form 240 — 5 Bac. 213. Ch. Pl. 602.

You perceive then that a novel assignment in a replication becomes virtually a new Dec. for it converts into the gist or ground of claim that which once was only a matter of aggravation. —

This does no injury to the Defts. for he may plead amiss as to a declaration, as not guilty &c Laws 165. 1 Saund 299. 3 East 294.

A novel assignment always concludes with an averment that the trespass or wrongs described in it are different from those justified in the plea. for the plea justifies that only which is of the gist of the action in the Declr. - And this averment that they are different cannot be traversed - but if not true the Defts may plead the general issue, which involves a denial that the wrongs are distinct -- Laws 164. 5. 240. 241. 1 Saund 299 n. 5.

It was anciently incumbent for the Defts. to set forth specifically all the particulars, however numerous they might be, of a defence consisting of special matter of avoidance. as general pleading by way of avoidance was never allowed by the rules of the C. Law. 1 Inst. 303. 8 Co. 133. 4 Bac. 90.

This rule however has in modern times been relaxed and indeed it seems to be almost impossible to conduct the pleadings according to the old rule - now since the business of men with each other have become so complicated it would be totally impracticable -

The general rule now is. that when the particular facts which contain the matter of avoidance would, if specifically pleaded tend to infinitude. general pleading is allowed. and the Court will know from the nature of the defence whether this will be the case or not - thus if in a Declr on covenant the performance must consist of a great variety of acts, Deft may plead performance generally. So in an action

on the bond of an under Sheff who has been years in the performance of those duties which he covenanted to perform. he cannot aver every official act he ever executed, it would be impracticable: he may aver the performance generally and the Plff in his replication must set forth specially a breach

So in actn. agt a brewer who covenanted to deliver all the grain thrown into his brewery. now as this is thrown into at a thousand diffrent times & in as many different quantities Deft may plead generally that he delivered all & Plff must assign a special breach — Co Ltt 749. 916. 1 Sid. 215. 234. 1 Saund 303. Comyn 575. 1 Saund 117 note 1. 2 Saund. 410. note 4 1 T. Rep 753. 2 Vent. 258.

The last cited authority contains some remarks on this subject by Justice Buller who was considered the most eminent special pleader of his time — He there observes that if there be any thing specific in the subject tho consisting of a number of a number of acts, they must be all enumerated. as on covenant "to enjoy all his lands," the covenantor in shewing performance must state them all: so if a person be bound "to pay all the legacies in a will" he must specify them all & aver payment of each: and the reason is, because all these facts lie within the knowledge of the party — But as to the distinction, to avoid repetition I would refer you to my title of "covenant broken" —

Every plea must be consistent with itself. hence repugnancy is a material point vitiates the whole, and this is a radical defect.

Where a traverse denies all that is alleged on the other side it is called a gen.l traverse. if it embraces only part it is called a special traverse. 4 Bac. 67

But a repugnancy in an immaterial point is now surplusage, unless advantage be taken of it by special demurrer, and it is the office of special demurrer to take advantage of formal errors. 1 Inst 303. 2 East 333. Salk 325. 1 Wils 98. Lawes 63. L. 170. 4 Bac. 94. Com. Dig. Pl. (2) 9.

When Deft justifies under writ, warrant or any other authority he must set it forth specially, alleging generally that he acted by authority of a certain writ or execution is not sufficient. he need not, indeed, recite it but must describe all the important parts of it. — for as it is a matter of law it must like all matters of law come before the court, otherwise the Judges could not see upon the record whether the writ was lawful and conferred the requisite authority or not. 1 Inst 283 a. 1 Saund. 298. n. 1. 2 Saund 402. n 1. Salk 107. 8. Com. Dig. Pl. E. 17. Hob. 127. 295. 3 Mod. 137. 8 & Mod 378. Ch. P. 514

I have now gone thro with all the enumerated requisites of a special plea in bar — form the form of commencing & concluding see Laws 138. 145. 159. 161. 3d Ld. Ray. passim

Traverse

A traverse is a denial of some particular point alleged in the pleadings on the other side & regularly tenders an issue. and may be taken to any part of the pleadings 1 Inst 282. Yelv 195.

When a traverse is preceded by an inducement it is properly called a technical traverse, and not as Mr Laws says a special traverse Laws 116. 7. 8. 21. 49. 4. Bac. 67.

It is said in some books that a traverse closes the issue. this as a general proposition is directly contrary

The quest. rule is that a traverse tenders an issue. —

to the truth. for a technical traverse does not regularly close the issue. but concludes with a verification. and if it is a special as well as a technical traverse it universally concludes with a verification. 3 Mar. 871, 1 Saund. 103 b

By a technical traverse I mean that traverse which is preceded by the words "absque hoc" without this or that, and this does not in general close the issue. 6 Co. 24. 4 Bac 67. 1 Bur 321 Laws 121. Ex. on a question of title. Defts. pleads that I.S. died seized in fee after having devised the lands in question to him. Plff does not intend to deny the devise but to traverse the fact of I.S. having died seized. in this case the Plff would say that he ought not to be barred for "I.S. died seized in tail or for years absque hoc died seized in fee". which amounts to a denial - the words absque hoc are technical terms of denial. - the replication concludes with a verification Defts. pleads over that I.S. died seized in fee & concludes to the country.

A technical traverse of this form rarely tenders the issue, not closes it. - it sometimes closes. but the instances in which it tenders are vastly the most numerous - the general rule is that a traverse tenders an issue.

I have observed that the words "absque hoc" are technical terms of denial. they are not however indispensable for the words et non are equally good as in the case above "et non died seized in fee." 1 Saund. 22. Laws 119.

A general traverse reaching the whole that is alleged on the other side does generally conclude to the country - because it can be of no possible advantage to either party to have the pleadings longer open for the party

That Defr committed the trespass of his own wrong without any such cause" in answer to justification pleaded in son assault demesne that Plff made the first assault & Defr committed the battery in his own defence.

Ply traverse is wholly inapt to deny matter of recog or matter of title, if then it is joined with matter of justification of wrong it should be distinctly traversed. 8 Co. 64a Laws 154. 1 Bur. 326

denies by this genral traverse all that has been alledged on the other side. as in the case of trespass by Sheff Deft: pleads. de injuriâ propriâ injuriâ absque tali causâ and concludes to the country. 4 Bac. 67. 8. 1 Saund 103. b. note 3. 1 Burr. 317. Cro 6 Eliz 117. otho 161. 164. Salk 4. 2 T. Rep 439. 1 B & P. 76

Absque tali causa refers to all that is alledged on the other side. Lawes 152. 8 Co 67. Lawes 154 to 156

It seems however that even a genral traverse may "in many cases" conclude to the country — or — with an averment — 10 T. Rulers remark however can be founded only in precedent. for it is contrary to principle and the genral rules of pleading. which require a conclusion to be made in the most expeditious manner. it truly occasions no harm but the necessity of pleading over. which says C.G. is I dare enough. It is contrary to the genral rules of pleading to conclude a genral traverse with a verification and certainly cannot be allowed except in those precise cases where it is warranted by precedent. 2 T. Rep 443. 1 Saund 14 3 a & b Lawes 121. 2 Burr. 1022. This is no objection to the genrals rule that traverses in genral must conclude with a verification. for all traverses most commonly are special traverses.

As to the appropriate use of that part of the gen: traverse. de injuriâ propriâ injuriâ absque tali causâ. see Lawes 154 to 156. 8. Co. 67. it denies all alleg^ns on the other side. Com. Dig. Tit. Pl. 20. 21 1 Burr 320. I would observe that a technical traverse which is preceded by inducement, begins with an absque hoc or equivalent words. differs from another kind of traverse viz a plain, direct, & positive denial in common negative language, both in diction and genrally in the conclusion also.

As to diff^ce of conveying in these two kinds of trusts. if no mo
Rep. 98. 2 Bur. 2 T. Rep 439. 2 Stra. 871. 1 Bun. 321. 2 e t.
Rep. 364 matter is alleged

The latter i.e. the plain traverse, is proper when the party tendering the issue has occasion to introduce new or special matter, as when this is the case there can be no occasion for any inducement for the traverse. 2 Saund. 206. a 207. a 1 Saund 103. a & b. 2 Stew Rep 364. n.

As a traverse is so very common in special pleading it is very necessary that you understand it. —

I am now to explain a technical traverse preceded by an inducement — To an ast on specialty, the Defence is usury, and the Defᵗ. pleads that by the contract it was corruptly agreed that he should pay & Plff receive at & after the rate of 10 p^{r}. C^{t}. interest. the Plff about to deny by a technical traverse. his replication is — that the promise was made on good & lawful consideration to pay six per cent absque hoc that it was corruptly agreed to pay 10 p^{r}. cent — this is an example of a technical traverse —

For an example of a traverse in common negative language — Defᵗ. pleads as before — now the Plff desiring this matter of inducement says — he ought not to be barred because it was not corruptly agᵈ to pay & receive 10 p^{r}. c^{t}.

But why is not this latter simple mode as good as the former? in some cases it is, in those cases it should be used — but in others this plain traverse would amount to a negative pregnant. as in the present case leaving room for the implication that 9 or 8 p^{r}. C^{t}. was entitled to be taken. — (in the case put however this can be of no importance as 8 is just as usurious as 10 —) the technical traverse is adopted to prevent a negative pregnant. the plain answer is that it was agreed to pay 6 & not 10. that being the inducement.

Ex. Pl.ff's pleas performance of a condition precedent, Defts. saying "that he
can not perform" the covenant is completed time is no essence of the bond

4 Bac. 67. 77. 2 Bur. 1322. Ray. 98. 2 T. Rep 439. 2 Stra. 871. 1 Bur. 321. Laws 116 to 118. 145. 149. 2 et Rep 364. note.

It is very necessary to understand the distinction between gen.l & special; technical & plain traverse. —

I have observed that a technical traverse concludes with a verification. and a traverse in common negative language concludes to the country. a traverse without any inducement in common language without any inducement forms a complete issue and hence frequently is called an issue — Laws 117.

Whether a wrong conclusion in either of these cases is ill on general demurrer the authorities are not agreed. It was formerly determined to be wrong in substance — and of course ill on general demurrer and this was the rule by C.L. but the Statute of 4 & 5 Anne has caused that to be now matter of form which by C.L. was considered matter of substance and I apprehend that such error is now ill on special demurrer only for the different opinions see Ray. 94. Cro. Chr. 117. or 164. 1 Vent 220. 1 Saund. 103.b. 285 note 5. 2 Saund. 190. note 5.

When an allegation on one side is expressly denied on the other in common negative language. superadding a formal technical traverse is unnecessary & improper. & therefore demurrable — as in the case of defence of usury mentioned before. when Plff replies that it was not corruptly agreed to pay 10 p.r 6.r & then superadds a technical traverse that it was agd to pay 6 absque hoc it was agreed to pay 10. for at this rate the parties might answer ever in infinitum 4 Bac 67. 2 Stra. 871. Cro Eliz 755. 1 Vent 101. Ray 98. 2 Saund 188.

without this traverse the pleadings will go on ad infinitum without ever coming to an issue. 4 Bac. 67. 68. 75. 70

I would here observe that in the language of pleading. concluding with a verification & concluding with an averment mean the same thing and are used in contradistinction to concluding to the country.—

It is a general & important rule that when one party alleges new matter inconsistent with any of the antecedent traversable allegations on the other side but which does not form an issue. he must traverse those allegations. eks if Defts plead a corrupt agreement for 10 per cent— Plff replies & says that the agreement was made "for 6 per cent only upon good & lawful consideration". here is no issue & Plff should have added "absque hoc it was agd "to pay 10 per cent." So too if Defts plead that Co. Defts was dead at the date of the writ. & Plff replies that he was alive & this is not enough he should have added "absque hoc he was dead" 1 Wms 25 2 Note 103. 1 Saund 22. 2 Saund 207. c. note 4 209 note 8 3 Bl. 310. — this is so familiar a rule that it is unnecessary to multiply authorities. —

But here there is a material diversity to be noticed. for when in an answer to a negative allegation. it is necessary for the other party to set forth affirmative matter specially. to make out an excuse or defence the party making this cannot conclude with a traverse of the negative matter alledged on the other side. tho the new matter is absolutely inconsistent with that thus alledged— Thus to an action of debt on Arbitration bond Defts plead no award. Plff replies there was & sets it forth specially. this, tho it plainly denies the plea cannot conclude with a traverse. but must leave the pleadings open to be answered

as the other party he avers - as they would not be if it concluded with an traverse — In this case says Chitty he must set forth the bond specialy and assign a breach (that the C. may judge of its legality) Hob. 233. 6 East 556. 7. 1 Chit. Pl. 587. 597. Laws. 150.

It is laid down as a gineral rule by Laws. & Comins that a special traverse must have a proper inducement or it will amount to a negative pregnant — this they took from an observation of Ld Hobarts in his own reports & tho it might have been true in that particular case yet as a gineral rule it is not true as an universal one it certainly is not — It is beginning at the wrong end — The true rule is. When a special traverse would amount to a negative pregnant, a proper inducement should be prefixed. — as in an act^n for ass^t & Battery. Def^t pleads molliter manus imposuit Plff replies he did not molliter &c. this is a negative pregnant as leaving room for the implication that he did not lay hands on him at all. he should have prefixed an inducement, as that Def^t committed an outragious battery upon him absque hoc molliter manus &c. — But if Def^t pleads that J. S. is dead, Plff may certainly reply that J. S. is not dead without an inducement. because without it it does not amount to the negative pregnant. Com. Dig. Pl. G. 20. 3 M. 16. Laws 118. Hob 321. It is true that he might have replied with an absque but it would have been prefetty useless.

And the rule holds in gineral only when the traverse taken by itself, without inducement, includes particulars not material and makes them a part of the issue, for then the inducement is necessary in order to show that the immaterial parts

· The best terms would be that "def.ts be not paid in manner & form"

are not in issue. as if Deft. pleads pay.t on 1st of Nov.r & Plff replies that he did not pay on the 1st of Nov.r this as it makes an immaterial issue is a negative pregnant and something must be said to show that the immaterial point is not put in issue - Dyer 280. 312 Willy 381. 1 Saund 103.b. 2 Saund 188.g.

When a party confesses, and avoids by new matter of his own that which is alledged on the other side a traverse is unnecessary & improper. for the new matter is not inconsistent with, in fact it really confesses the allegations, and would make the pleadings of the party repugnant. this therefore can never be proper. as if Deft. pleads infancy. Plff replies that he promised after coming of full age - here he cannot traverse the plea for it would be denying what at the same time he allows. -

Again Deft. pleads a release. Plff replies that the release was obtained by fraud. here if he had added absque hoc &c. traversing the execution or grant of release. it would be a contradiction. — The party last pleading thus in this case cannot traverse but must conclude his new matter with a verification - Cro. Eliz. 384. Yelv 121. 2 Mod. 168. 3 Bl. 309. 1 Wils 253. 1 Saund 22 note. 2 Saund. 5 note 3. 1 Saund. 207 note 5. & 209. Cro. Jac. 221.

I will here observe that a traverse preceded by an inducement when properly joined. is but a conclusion of fact from the inducement when they go to the same point. ground of claim or defence. As when Deft. pleads that J. S. died seized in fee Plff replies that J.S. died seized in tail. absque hoc quod

seized in fee. this is a conclusion of fact from the inducement for if he did seize in tail he did not die seized in fee in common language he did seize in fee & therefore he did not die seized in fee. — and in conclusion that an inducement is improper when the conclusion does not thus follow from it. —

I observed that a technical traverse usually concludes with a verification tendering an issue, the issue is then closed by the opposite party pleading or affirming over that which is traversed & concluding to the country thus. care as before supposed. Deft. pleads over that J.S. did die seized in fee as in his plea in bar thereof he hath alledged. and of this he puts himself upon the country for trial. Salk 4. 1 Inst 126 a. Lam 149. 4 Bac. 67. 8.

Lord Coke says "that an issue joined upon an absque hoc ought to have "an affirmative after it." this is a blind rule. meaning unclouded by that a negative allegd cannot be traversed with an absque hoc. but must be traversed with an affirmative,

Thus Deft. pleads that Co. Deft. was not alive &c. now it will not do for Plff to say that he was alive absque hoc that he was not alive. here are two negatives which if it is true form an affirmative. yet the language being uncouth the law does not allow it, is a mistake in point of form. 1 Inst 126 a. Lam 121. 4 Bac. 68 n.

The omission of a traverse when necessary seems to have been at C.L. a defect in matter of substance and of course ill on general demurrer. but by Stat of Jeofails upon a

The objection not that not enough on the record, so I think it a formal mistake only, at C.L. 4 Bac. 70 tit

Com. Dig. Pl. C. 17.
1 Chit. Pl. 597.

it is made a defect in form only & is to be reached only by special demurrer. 4 Bac. 70. Title 2 Mod. 60. (1 Lev. 43. 4) 1 Saund. 103. 6.

It is a general rule that when a material traverse is taken on one side there cannot be a traverse upon that traverse. by this is meant, that when one of the parties has tendred a material traverse, the other party, cannot abandon that & tender another of his own to the same point i.e. the same ground of title claim or defence (on the inducement. to the first) but he must join in the first traverse. There is no rule more puzzling to students than this which is well explained by Lord Hobart in his own way. Hob. 104 Sutton 79. 1 Inst. 282 1 Rm. Bl. 403. 2 Mod 183. — The Defr pleads S.S. and sized in fee, Plff replies he died sized in tail, also gives hue that he died sized in fee. now Defr must join in this traverse, he cannot say that S.S. died sized in fee also gives hue that he died sized in tail for all the allegations go to the same point of defence if Defr was allowed to abandon the traverse the other party might do the same and this traverse might be joined on inducement ad infinitum. Defr ought to accept the traverse and conclude to the country. —

On the other hand a traverse after a traverse is good even tho the first traverse is on a material point Same auth. & Pop. 101. Com. Dig. Pl. G. 18. Hob 104 this is a traverse which does not go to the same point, i.e. to the same ground of defence ground of claim or title as is embraced by the first traverse. & this it is which distinguishes it from a traverse upon a traverse.

Thus if an acr for trespass changed to have been committed on a particular day. Defr pleads a license on such a day (and a day)

The trespass justified is one & the traverse is another. the traverse is after a traverse because it covers a diff.t time from the former traverse. the first covers all befor & after the particular day. the second covers the particular day.

This is done by pleading specially to a material point & traversing that which is immaterial. –

this plea is not broad enough to answer to whole cause of action for perhaps Plff intends to sue for trespass on an other day. Deft. must therefore traverse all guilty before & after that day and previous to the date of the writ. Now the inducement, to wit, the license, goes to the particular day and therefore that he was guilty with before he answers as to all the time besides the particular day, which is included in the inducement. so that it is clear that the inducement does not go to the same point of defence as the traverse Now the Plff is not bound to accept this traverse, to wit, that there was no trespass committed before or after the particular day specified for it may be there was no trespass committed except on that day But he may abandon this and traverse the other ground of defence, to wit, the license. — This certainly is very intelligible if you understand the gist of the distinction. —

This mode of pleading is not the best. a better & more simple mode would have been for Deft. to have pleaded specially as to the matter to be avoided & the general issue as to the rest. as that to any trespass before or after the particular day & before the date of the writ he is not guilty, and as to that day plead the license — and this is now the more usual way.

But this general rule that there cannot be a traverse upon a traverse, does not extend to a case when the first traverse is of an immaterial point. Now the opposite party may treat the immaterial traverse as a mere nullity and only tender a traverse on the inducement. as in act. of waste laying that Deft. cut & sold timber trees. Deft. then pleads some special matter, as that he cut them & employed them

in mesp any repl ains absque hoc that he rob'd them. Plff may abandon this immaterial issue which Defts tenders and take issue upon the inducement to wit the cutting or he may demur specially Hob. 104. 4 Bac. 73. 6 bo 2 4 Cro. Eliz. 99. 1 Inst 282 b. Strange 117. 4 T. Rep 440. — That Plff may demur for the immateriality of the traverse see 1 Saund 21 note. Cro E. 221 Yelv. 167. Carth. 116. 1 H. Bl. 378. 416.

There may be a traverse upon a traverse when a tres. pass is laid for taking goods in the County of A and the Defts pleads local justification in the County of B. with (an absque hoc ita) a traverse that he committed the trespass in the County of A. as that he was Plff in the County of B and took them absque hoc that he took them in Co. of A — Now if Plff was bound to accept this traverse. to wit, of the trespass not having been committed in A and the justification i.e. the inducement to wit. the Defts being Sheriff. was false. the Plff would be defeated when by the supposition he ought to recover. He is allowed then to divert this traverse & issue tenders. to wit. that the trespass was committed in B & not in A and to traverse the justification to wit the Defts being Sheff and acted under proper authority. otherwise the Plff could not bring his transitory action where he pleases — These are the only two exceptions to the general rule that there can be no traverse upon a traverse. in both these cases the first & second traverse go to the same point of defence — and if the justification is false the plea in both cases is immaterial — For this Latter rule see Pasch. 101. Cro. Eliz 99. & 18. Cro Car. 105. 4 T. Rep 439. 5 T. Rep 367. 1 Hen. Bl. 403. 1 Chit. Pl. 597. 2 Hen. Bl. 182. 1 Saund 22. note. Com. Dig.

This distinction appears technical and artificial but it is very necessary to be understood & one which I never fail to recommend to the critical attention of students. —

When the cause of action laid in the declaration is divisible so that the Plff is entitled to recover for such a part of it as he can prove: Defr cannot make, that part of his plea, which is an answer to a part of the Declaration or of the cause of action; an inducement to a traverse of the residue Ex. Act. of a/c for £100 Defr pleads pay. of £75 absque hoc that he owed any more than 75 & if Plff joined in this traverse he might recover the remaining £25 but would be precluded from traversing the pay. & would if the £75 had not been paid but be able to claim what was really due. 1 Saund. 267. 269.

Suppose an act. is bro't for detaining corn of the plff's tight. Defr justifies for two & justifies than it is bad pleading for if Plff joined he could recover but for one as he is precluded from denying the justification. — how the Defr justifies for two absque hoc that he stolen them — which is bad for the inducement goes only to a part of the declaration, Yelv. 225. Com. Dig. Pl. G. 20. 1 Saund. 267-269.

In these cases the only correct mode of pleading is for Defr to plead the gen. issue to those parts to which he does not plead specially as if in a/c for £100 Plff is entitled to but £70 Defr pleads as to £25 non a/c and as to the residue £75 pay., release &c —

The party to whom a traverse is tendered does not

by joining in it admit the special matter alleged in the inducement to be true when he is obliged to join in the traverse. for if so he might always be entrapped by a false inducement. indeed when the inducement and traverse are properly adapted to each other & go to the same point; joining in the traverse includes a negation of the inducement, for the traverse is (expressly) (impliedly) a conclusion from the inducement. — 5 Bac 386. 5 Bac. 386. Hob. 104

But when there is an impertinent inducement the traverse is not necessarily a negation of the inducement. 4 Bac. 68. note —

To avoid such admissions being taken advantage of in some future litigation; the party joining in such a traverse out of abundant caution uses a protestation. — this answers no purpose in the suit in which it is used. for it is not in issue. is no part of the pleadings & needs no answer. it is a thing by the by made to exclude a possible admission on the record which might be used in some future controversy. Com Dig Pl. et. Law 141. 143. 4 Bac. 68. Com. Dig. Pl. N.

A party traversing a traverse admits of course what he does not traverse for he is at liberty to deny what he pleases.

But on the other hand. he who joins in a traverse being compellable to join, does not of course admit what precedes it. Salk 91. 1 Wils 338. 4 Bac 2. 73. 3 Day 230

To the party traversing a protestation may be often necessary it may be he does wish to admit a particular allegation for the sake of the present suit. or does not intend that an allegation shall stand con-

Prostitution does not avail a party if the cause is found ag.st him
a repugnant prostitution does not affect the pleadgs. Com. D. Pl. R.

fixed on the record which he means to deny in some future controversy and in this way he may avoid an admission which he does not chuse to make. This is to prevent the record being used as evidence in any future suit or case and hence a protestation is called the exclusion of a conclusion, implication or admission. 3 Bl. 311. 1 Inst 126. 2 T. Rep 441. 2 Bur. 1020. Litt. sec. 192. Laws 141-2.

This is the only mode of denying those allegations which cannot be properly put in issue, for Protestation is not part of the pleadings. Com. Dig. Pl. N. Laws 142. Plow. 276(b)

The form of protestation is merely this "I Plff or Deft protesting that such & such allegations are not true." continues "for plea or replication &c" this "I then" whatever he may have to say.

A traverse can properly be taken only on a material point. by a material point is meant of course, one that is decisive of the controversy or cause of action — a traverse on an immaterial point is demurrable only because it is immaterial. 6 Co 2 a. 1 Roll 235. Comber. 321. 2 Saund. 5. 28. 328.

If an immaterial traverse is taken however, advantage can be taken of it only by special demurrer by Stats. 4 Ann & 27 Eliz by C. L it was a defect in substance to be reached by a general demurrer. 1 Saund 14. 21.n 2 Saund 207. b & n. 319 a & b. Str. 694. (Contra Strange 817. 818. this however is not law.) for the C. L. rule see Ryder 165. — Stats 4 Bac. 423 1 Bac. 94.5.

If the party

How a the case may be a verdict will cure the issue. for there are cases in wh. the verdict will decide the right in others it would not be so. Suppose in debt: Defᵗ pleads tender on particular day & Plff traverses but can do as well the day. now if found for Plff judgt is arrested, for he might have tendered in time notwithstandg. but if for Defᵗ it would be decisive. Plff should have traversed in manner & form wh would not put the day in issue. —

point means a single ground of claim or defence —

to whom an immaterial tenders ~~ispue~~ is tendered & accepts it & joins in it. and a verdict is found. judgt must be arrested as the case may be. and a repleader awarded.— this I shall observe more largely upon under the head arrest.

Now if an ispue is taken upon an immaterial traverse in such a way as to decide the cause of action. the way the ispue is found is cured by the verdict. 2 Saund 319. a note 6. 1 Saund. 228. n.1 Salk 596. Carth. 371. Cro. Jac. 434. 585.

Again. a traverse can only be taken on an ispuable point. for there are material points which the rules of pleading do not allow to be traversed. so that it must be taken on a point material & ispuable — generally however what is material is ispuable — thus a matter of law however material cannot be traversed. Thus in trespass Defr pleads justification. that he was Shff and took the goods as by law he had a right to do. this cannot be traversed.— Nor a ~~ispue~~ point in issue licuit per quod or virtute cujus in a justification. as where Defr in false imprisonment pleads a per quod or virtute cujus — here Plff may deny the existence of the writ or that Defr was a proper officer to execute it, but not that the writ was insufficient as it is not ispuable. nor a per quod that going only to the amount of damages Hob. 103. 2 Bl. Rep. 776. 3 Wils 234. Saun 46. 118. 11 Co. 8. b.[10] 2 Mod. Bl. 182. 1 Saund 268. a. note. 22. & 3 note.[5] 298 note 2 Keb. 607. 5. T. Rep 66. Com. Dig. Pl. G 14. Cro. Eliz. 269. Doug. 159. 3 La. Ray. 210.

It is a general rule that a traverse must be taken only on a single point of claim or defence. for if

"commonable used in that report in describing the gender, means or title to
common.

including more than a single point it becomes double & duplicity in pleading is not allowed. this point however need not consist of a single fact. it may include several facts. but these must be but one point of claim or defence. this rule is well explained in 1 Burr. 320. see also 3 Lev. 40. But N.P. 93. 1 B & P. 80. 8 Co. 66.

In the application of this rule when the pleader can distinguish between the several grounds of claim or defence he can never be mistaken, but with respect to distinct or single facts there has been some confusion.

In an act. of trespass Defts. pleads. the lands were common & Defts cattle were intitled to that common. now Plff cannot be admitted to traverse both these grounds of defence. but he may traverse that the cattle are intitled to common that being one ground of defence - & that the cattle were commonable, levant & couchant, and belong to Defts. which are the points of fact absolutely necessary for Defts. defence -

Suppose an award is to be plead in bar. Defts must shew all the circumstances viz submission. meeting of the arbitrators. the making & publishing the award. now Plff may deny at once the making & publishing the award. as these go to the same point of defence. but he cannot traverse the submission and the making of the award together as they are distinct grounds of defence.

If there are two material points alleged the opposite party may traverse which point he pleases, tho the rule is that he can traverse but one. 6 Co. 24 b. 1 Wils 338. Com

Act of Eliz. made generally provided that cross in form shall be marked only by special direct. of Statute. specific the cross

Dig. Pl. G 10.

Nothing except what is alleged on the other side or necessarily implied can be traversed. for a traverse is essentially a denial of what is alleged on the other side. suppose an Act. brot. on contract within the Stat of frauds & perjuries & Plff does not allege & set forth that the contract is in writing — Deft ought not to plead that Plff ought to be barred absque hoc that the contract was in writing. 2 Vent 79. Salk 628. G. 1 Saund 206. 312 note 4. 2 Saund 10. note 14. Com. Dig. Pl. G. 13. 8. Cautth. 99.

A traverse in such a case is now by 27 Eliz or entirely to deny. ill only on special demurrer. the necessary matter appears to be true but not in the proper form — because it really sets out in the form of a traverse what would be proper to set out in a special plea only. 2 Bac 75. Ld Ray 238. 1 Saund 312. d note 4

But any material fact virtually appearing in the Pleadings may be traversed, whether it is in the form of precise substantive allegation or of mere suggestion or recital. Saun 48. 2 Saund 206a note 2 & 2. Cro Eliz 169. Com Dig Pl. G. 11.

When a party justifies or in any other way confesses and avoids as to only part of what is alledged on the other side, his traverse or other answer must be conterminous with the part not (thus) justified or otherwise avoided. Ex. Act. of Trespass Deft. pleads a release, he must traverse all subsequent trespasses, if a profession all antecedent. if a license on a particular day any time must traverse all before or after. otherwise part of the cause of action or defence remaining

unanswered. Rob. 104. 2 Mod 68. 1 Sid 293. Salk 222. 6 Co Elz. 87. 1 Lev. 241. 307. 4 Esp. 415

I would observe that when the justification in trespass is laid on the same day as that on which the trespass is alleged to have been committed there is no need of a traverse as to any other time. 5 Bac. 206. 3 Salk 82. 1 Buls. 138. 1 Saund 14. 2 Saund 5 a. b. 295. b. because the justification prima facie covers the whole ground of the declaration.

But if the justification is laid on the very day the trespass is laid & yet in point of fact Plff relies on a distinct trespass the above rule does not embarrass him. he has nothing to do but to make a novel assignment and aver the difference.

And the rule is the same if Plff relies upon a trespass committed on the same day two different from the one charged in the Decl^n. Bull N. P. 17. Cro E. 165. 514. Ray 86 3 Bl. 311. 4 Bac 135

If trespass is laid on a day certain and divers other days. to plead a license or justification on that certain day is prima facie sufficient & good on demurr. And if the trespass was really committed on another day Plff may make a new assignment. 2 Saund 5. a & b. 1 T. Rep 636.—

It seems to be the better opinion. that a traverse before & after the day of justification is not necessary if the Def^t expressly avers that the acts justified are the same as those complained of. this is our practice The Def^t. pleads license on the day & avers it to be the same act as the one complained of. & Plff may traverse this aver

ment if it is not true. 5 Bac. 207. 1 Saund 14 note 2. 298 note 2. Comyn 161. Salk 64 Cro Eliz 667. 2 Saund. 5 b the note - contra 1 Vent 184. 2 Keb. 878. (1 Ball. 138 3 Lev. 277. acc.)

A traverse must tender and oblige the opposite party to join when the inducement & traverse go to the same point as they must always do / of what use, it is often asked, is the inducement? as no reply can be made to it, nor issue taken to it. it is said in a late publication on the laws of Con. to be mere pageantry. it is true that in many cases it is of no use and a denial in common negative language would be better as being a more simple mode of bringing the pleadings to an issue - but in other cases an inducement is indispensably necessary 1st to prevent a negative pregnant by regulating and limiting the traverse Laws 118 - 2d When it used by way of protestation which is very important in some cases. in these two cases the inducement & traverse both go to the same point - 3d When the inducement & the traverse go to different points. an inducement is absolutely necessary to cover the whole declaration for the traverse alone is not an answer to the whole - and if it were not for the inducement only a part only would be answered of that which requires an answer.

An inducement to a traverse must always be issuable matter. i.e. the fact must be one on which issue might be taken if it was in a different parts of the pleadings. 2 Leon. 32. Cro Eliz. 336. 4 Bac. 68.

The reason of this rule is, that as when the inducement & traverse go to the same point. the tra-

Hall includes a traverse upon immaterial ~~points~~ viz. the number for Plff can recover if he proves only 1 light stolen. Def^{t} shd plead quot. ipsum as to the whole or a defence as to the whole of the stolen but qua...

use is but a conclusion from the inducement. it follows of course that a traverse cannot consist of issuable or material matter unless the inducement does also.— and if they go to different points the inducement must surely be issuable for it is traversable. being part of defence

so you perceive that the rule is rational and unexceptionable

A traverse generally pursues the terms of the allegation traversed. but a traverse in the very terms of the allegation is not always proper or sufficient. for the use of those terms will sometimes amount to a negative pregnant.— as when the allegation is on an immaterial point. Thus if Defᵗ pleads a release since the date of the writ. Pltff replies it is not his deed since the date of the writ. this is bad. for it leaves room for the implication that there was a release some time or other. So in an actⁿ for obstruction of three of the Pltffs lights. Defᵗ pleads traversing that he obstructed 3. here also there is room for the implication that he obstructed two.— and here a traverse in the very terms of the allegation amounts to a negative pregnant & in both the cases vitiates the plea.

You will remember that it is a general rule that no issue can be joined on a negative pregnant. 1 Saunᵈˢ 126 a. 303 a. 5 Dᵉ Rᵉ 101. Stra. 493 1 Saund 268. 9 Com. Digᵉ Pl. R. 5ᵗ 2 Lev. 12 2 Saund. 207. 319.

Actⁿ for not paying Defᵗ pleads tender at a particular place when no place was fixed for the payment or delivery and Pltff traverses a tender at that place. this is pursuing too strictly the terms of defence & leaves room for an implication of tender at some other. Pltff should have

Synopsis of the rule of Traverse from 1 Saund. 22. n. 2.

1st Whenever any material fact is alleged in any pleading, which if denied will upon issue joined decide the cause one way or the other; if the adverse party plead a matter inconsistent with & contrary to such allegation, he must traverse it.

2d Whenever such traverse is taken, the other party is bound to it & cannot waive & tender another traverse; for the parties are not to go on ad infinitum.

3d If the traverse be not to the substance and point of the action, the other party may either pass it by, & tender another traverse, or demur specially for this cause.

4th In some cases a traverse may be taken upon after or form not apt & pertinent traverse: as where in a transitory action laid in such a county, there is a

traverse is the tender made etc. formal. Saun. 114. 2 Saund 319
2 Lev. 12.

There is a distinction to be be noted between a plea of payment in an action on Contract made payable on or before such a day and on one payable on such a day—

If to an act^n for money payable on or before 20th Novr such a day— Deft^t pleads payt before (or some one day before the time) on 1st Novr Pltff should reply that Deft^t did not pay on the 1st Novr or before or after. here Pltff traverses what is not alledged the cannot demur to such a plea for Deft^t had a right to pay when he pleased. 2 Burr. 944. 2 Wils. 173. 4 Bac. Abr. 66 This reason of this rule is very plain. for the money is payable on or before the 20th Novr and payment on any day before the 20th (as the 1st) is a strict performance of the contract alleged hence the Pltff must so traverse as to assign an absolute breach saying he did not pay before (or on the first) would assign no breach but traversing the payment on the first or on any day before or after (which of course includes the 20th) does shew an absolute breach— Stra. 994. this is a case you will observe altogether sui generis.—

But when money is payable on a particular day— if Deft^t pleads payment on that day. Pltff must only traverse the payt in manner & form &c.

For if an obligation is payable on a day certain. and is paid before that day Deft^t must plead payment on this day appointed for the payment and evidence of its having been paid any time before will establish his plea.— There are diversities in traversing of

special local justification. with a traverse of the county. the Plff may either traverse the special local justification or join in the Defts traverse at his election.

5th But when a material point alleged by one party is fully confessed & avoided. i.e. when the other party sets up a matter consistent with such allegation. but which if true. is an answer to it. then he cannot also traverse it.

6th Lastly. A traverse ought not to be taken but when the thing traversed is an issuable fact 11 Co. 10 b.

frequent occurrence and as they are of daily use ought to be well understood. 2 Wils 150. 2 Burr 944. Com. Dig. Pl. E. 37.

I would here observe that by Stat 32 Hen. 8. a negative plea is ruled by very strict & seems to be ill only on special demurrer. 4 Bac. 98. Cro. Jac. 87. 312. 560.

A traverse is usually taken or concluded by the words modo et forma — the party denies in manner & form &c — But these words are not indispensable even in point of form Com. Dig Pl. G. 1. Lawes 120 — whether in form of form to the [illegible] or a technical traverse.

Duplicity.

This is sometimes called double pleading or double pleading and is ill because it tends to ensnare any protestity to confusion & vexation. 1 Inst. 304 a. 3 Bl. 311. 4 Burr 1189. 1 Wms. 477.8

A double plea is one which consists of several distinct and independant matters alleged to the same point. i.e the same ground of claims or defences and requiring different answers.

Or it may be defined to be one which consists of several distinct and independant matters alleged to the whole or to one and the same part of claim or defence. i.e. Plea cannot be two independant & distinct answers given to the same thing whatever that may be. whether the whole or a part of what is alleged 1 Inst 303. b. 304 a. 4 Bac. 118. 1 Salk 180. 3 Salk. 142. 1 Saund 336. 7.

But giving different answers to different parts

If but

of the declaration or plea does not constitute duplicity for how each answer is given to a distinct point. Ex. as to part Gen. issue to another part. special matter of avoidance as to residue justifies. demurrer &c — Leave if each extended to the whole — Laws 101. 1 Inst. 304.a 4 Bac 118.19.129.

At C. Law if there are several Defts each may plead a single plea to the whole or to different parts of the declaration for the plea of one is no plea for the other and the defences may be totally different so here is no duplicity. Hob. 70. 2 Stra. 1140. 1 Salk. 610. Ld Ray 1372 Yelv. 13. Laws 132.

If an action on contract is brought against two Defts they cannot sever in their pleas, unless, as I presume, where they shew different defences. so if they join in one plea as the gen. issue if the plea is good for one it is good for both —

It has been decided in Massachusetts that Co-Defts cannot sever in pleading except in actions sounding in tort. — it is the only decision of the kind that I know of. 6 Mass. 444.

Rule. Every plea must be simple, entire, connected and confined to a single point. 3. BC. 311.

But this point need not consist of a single fact. many facts may be necessary to constitute a ground of action or defence. as in case of accord & satisfaction. an award of arbitrators & many others in which a good ground of defence must consist of an indefinite number of facts.

The rule seems to mean

as if Def.t sued as a first offender. he must not plead also that he
arrested Pl.ff for breach of peace.—

these matters of fact must be confined to one single point or substantive ground of defence. 1 Burr. 320. 2 Bl. Rep 1028. 3 Salk. 142. 4 Bac. 68. 120.

So in an action for malicious prosecution Deft. may plead all those circumstances which go to prove that he had ground of suspicion, or probable cause Bro. Ej 134. 871. 900.

The rule is the same in act^n for false imprisonment. of Bill when the arrest is for suspicion. Deft may allege all his reasons for suspecting 2 Hawk 121. for they all go to the same point reasonable ground of suspicion.—

In these cases the answer is short as the replication of "de son tort demesne" answers the whole. indeed the plea does not admit of distinct answers. So it is not double.—

But when Deft^s relies for justification upon one act or acts done by Plff, he must confine himself to that alone, since a defence of this kind is sufficient joining on other matter of defence would make the plea double Esp. Dig 535.6—

So when the fact relied on for defence is a consequence of another they may both be alledged. Thus in act^n ag^t administrator he pleads plene administravit. and has nothing remaining in his hands then the fact on which he relied was an influence from his having fully administered viz that he had disposed of the whole assets. Bro Dig. Pl. C. 2. Plow. 140. a. 1 Burr 320

You receive then that the single point of defence may consist of any number of facts—

distinct counts in one decl^n each count being in itself single. whether intended to establish one right of action or several do not amount to duplicity.

But if one & the same count contain distinct and independent grounds of claim & require distinct and independent answers. that count is double.

As to the object of inserting several counts in one declaration. when there is but one cause of action - as to prevent the possibility of failure &c. see 3. Bl. 295 —

On the other hand some surplusage does constitute duplicity. the surplusage is rejected and the pleadings are treated as if the surplusage was not in them. Thus if two defences are pleaded that are distinct one of which is frivolous or not issuable - as if in action on note Defts. pleads payment & that Plff was a feme & not entitled to payment. this does not constitute duplicity. 1 Sid. 175 1 Keb. 661. Dyer 4 2. 2 Roll. 376

Duplicity in the decl^n consists then in unnecessarily joining in one count distinct and substantive grounds of action of similar or different kinds to enforce one right of recovery. Examples of this kind of duplicity are rare. Suppose one Howson. Defts had contracted to deliver the grain from his brew house — Plff alleged in one count the breach of the contract in non delivery and found in mixing ashes with & spoiling the grain. one of these allegations would have been sufficient and uniting the other constitutes the duplicity. 1 Vent. 365. 6 co 6 b^s. 20. 2 Vent. 198. Com. Dig. Pl. C. 33. Stat. G. 4. action G. Ld Ray. 404.

One debt on penal

The effect of both these Statutes is to enable a court of Law to award a penalty and the action is thus brot within the same rule as that which governs covts brot at C.L.

Each defence must be pleaded in diffs pleas unless one state the whole of the

bond. the assignment of more than one breach is duplicity at C.L. it is unnecessary for one breach works a total forfeiture 1 Bac. 544. Cont. 297. 3 Salk 108. 1 Vent. 114. 126. Lam 25 to 27. 2 Wils. 267. Com. Dig. Pl. C. 33

But in action of covenant broken Plff may at C. L. assign as many breaches as he pleases. for the action being brought to recover the actual damages sustained in consequence of the breaches, and will recover only pro tanto as much as he proves. 1 Bac. 544. 6 Mo 6 Wm. 176. Com. Dig. Pl. C. 33. + not a sum of money in numero

The rule is the same in Con. in act. for statute or penal bond. for by Stat. he recovers as he would on cov.t broken at C.L. Hence therefore the rule is and must be that he may assign as many breaches as he pleases and the penalty is changed down to the amt of damages proved. Stat Con. 27. and now by Stat 8 & 9 Wm 3 a similar rule is established in England and was probably taken from our Statute. 8 T. Rep 126. 459 2 Wils. 377. Comp 357. 2 Bur. 820. Bl. Rep. 1111. 1016.

But notwithstanding the general rule of C.L. that two distinct defences cannot be plead to one point of claim. by Stat 4 & 5 Ann: the Defts may by leave of court plead as many distinct defences as he pleases to one and the same point. thus the C.L. rule is abrogated. & the leave of court is now mere fiction, he only stating "by leave &c" 3 Bl. 308

But this Stat. you will observe reaches only the answers of Defts to the Declaration. hence there is no ground for Plff to make two distinct replications to one plea in bar. or for Defts to make two distinct rejoinders to one replication. 4 Bac. 121 3 Bl. 318. Com. Dig. Pl. E. 2. 2 Ray 1099. Lam 27-8.

And a year since in the fall of 1815. The legislature of Con. enacted a similar statute in the same words. I have long been anxious that such a stat should be enacted for the ignorance of clients and the misfortune of counsel in choosing wrong grounds of defence under it absolutely for the due administration of justice —

Duplicity is by stat 27 Eliz reduced to form so that advantage can be taken of it by special demurrer only and the demurrer must be strictly special. "duplex et contra formam" is not sufficient. the finger must be laid on the very spot and the particular pointed out in which the duplicity consists. 2 Bac. 134. 1 Saund 337. Salk. 219. 678. L. Ray 332. 798. 1 Wils. 219. Com. Dig. Pl. C. 33. E. 2. Cro. Car. 14 or. 20. (Cro Eliz. 810 contra)

Yet if two distinct and sufficient answers are given to what is alleged on the other side and the opposite party does not demur to it, he must traverse both of those answers, and may traverse them singly. for by the suppo. each being sufficient. if he have one untraversed i.e. confessed, he will be estopped — 1 Vent. 272. 2 Bac 119.

The rule requiring a demurrer to duplicity to be special does not apply to case in which the Plff joins in one Declaration different causes of action which according to the rule of pleading cannot be joined as distinct and substantive grounds of recovery or to enforce distinct claims. Thus if Plff joins a/c + Tort Debt and trespass for these require different judg.ts as there is no judg.t at C. L. adapted to both claims. judg.t cannot be rendered on such Dec.n for in fact it is joining two incongruous causes of action joined to

This [illegible] varies from the form prescribed by our statute that

enforce two distinct claims - it constitutes misjoinder not duplicity and is ill on general demurrer or advantage may be taken of it by motion in arrest of judgment. Salk 10. Ray 233. 3 Lev. 99. 1 T. Rep. 274. 8 Coke 87. Comb. 333. 1 Bac. 51.

Profert and oyer

It is a general rule at C. L. that when a party declares upon or pleads a deed and makes title under it i.e. makes it the foundation of his claim or defence. he must make profert of it, or plead it with profert, averring that he brings the said deed into court. Com Dig. Pl. O. Laws 96. 7. for the form of profert see 3 Bl. app. 22.

Profert is thus required that the adverse party may have oyer i.e. to hear it read and a copy of it and that the court may command it & inspect when they please. 6 Co. 38. 10 Co. 93. Hob 233. Com. Dig. Pl. P. 4 Bac. 109. 113.

When the party against whom the deed is thus pleaded is entitled to oyer. he is not obliged to plead without oyer. but if he does he waives it. 4 Bac. 113 Salk 119. 6 Mod. 283.

But profert is never made at C. L. of a bill of exchange or promissory note or any other writing of a lower nature than a deed. for they are not deeds at C. L. on which the action is founded but only evidence of the promise made. Bunbury 243. Chit. Bills 185.

In Com. promissory notes, not negociable, and it seems all other unsealed writings containing express promises covenants &c are declared on as specialties if they are not negociable & profert is regularly made of them as of any other deeds.

12mt. 225

If a party pleads a deed in support of a right that would pass without deed & makes title under it. he must plead with profert — But if he does not found his right upon the deed he need not make profert even though there is a deed. and in an assignment of a lease. the party need not shew that it was by deed. since an assignment of a lease is good at C L without deed.) and this even though he was bound by contract not to assign without deed: seems if the right will not pass without deed. 6 Co. 38 a & b. 1 Bulst. 119. 1 Saund 9. a note 3 T. Rep 156. 2 Mod. 64. Laws 97. 4 Bac. 110.

But where the right will pass without deed if the party pleads the deed and makes title under it, profert must be made. 4 Bac. 110. 2 Mod. 64. La. 97. but if he pleads the deed without making title under it as by way of inducement he need not make profert. 6. Co. 38. Thus deed alleged in an inducement in an action on the case. for it is not the ground of action or defence — 10 Co 92. 6 T.R.

But a stranger to a deed may always plead it without profert whether he makes title under or not. because it is supposed not to be in his possession, and the Law never requires what in common presumption the party is unable to do. 10 Co 92. 1 Vez 394. 3 Lev. 80. 2 Shown. 418 Cro Car. 119. 1 Saund. 9. a. 4 Bac. 111.

So in general one who acquires a right under a deed by operation of Law is not obliged to plead the deed with profert and for the same reason. Thus tenant in dower the heir being supposed to have the deeds. — the former may be forced to deliver them up by Writ of right to any rate. 5 Co. 75.

he is presumed to have them & may retain them agt the heir at Law. 4 Bac. 110. 1 Inst. 226a

Cent 305. 1 Inst 225.

There is an exception however to the last rule as to the tenant by the curtesy — if he pleads a deed to his wife he must make profert for he is supposed to have possession of his wifes deeds 10 Co 94. to ib. contr. —

Privies to a deed must regularly make profert of them in all cases where the original parties themselves would have been bound to do it — as the heir must make profert of the deed to his ancestor for privity of blood, so remainder man of the deed to reversioner this being privity of estate and Ex^r or admin^r of the deed to his testator or intestate for privity in representation — 1 Inst. 267.b 317.b 10 Co 92. 94.

But he who pleads a record need not make profert of it. altho' it is the record of the court in which he pleads. for the record is not the property of any individual but belongs to the public, is kept in a public office open to the inspection of any one who may wish to see or have a copy of it. — the form of pleading it, is. as by the record remaining in this court appears — .

a fortiori then a party cannot be forced to make profert of the record of another court. — Bull N. P. 252. 6 Mod. 237. 1 Inst 225. Tidd 529

But letters testamentary must be pleaded with a profert. Ca. 96. in Engl. but is now required in Cont.

A deed or private instrument when lost or destroyed by time or casualty may be pleaded without profert — The rule is the same when the instrument is in the possession of the adverse party, but he must in both these

Profit [illegible] regarded him as maker of form only.

cases and the reasons why he does not make profert, stating the special facts as his Declaration will be demurrable. 5 Co. 74. 5. 3 T. Rep 151. 1 Wils 16. Stra. 1186. 2 Am Bl. 243 or 263 10 Co. 92. 3. Stra 1186. 1 Saund 9th

You will find it stated in some books that the only remedy for those whose instruments were lost or in the hands of the adverse party was by application to Chancery. but now-days there is no need of that Hob. 109. 1 Ford. 14. 15. 3 Atk 17. 1 Vez 392.

If a party whose deed is lost or in the hands of the adverse party should ignorantly or inadvertently plead with profert. he is bound by it and the opposite party is entitled to oyer and he discontinued his own case if he does not grant it.

Modern practice however allows the party to excuse the profert and demand by assigning the special matter, by reason of which he does not make profert. — 1 Saund. 9a. 1 Wils 16 3 T. Rep. 153. note —

When the deed or instrument is lost an inducement to the act. or defence, it may be pleaded without profert this is but a consequence of a former rule as the instrument is not is not made the ground of claim or defence. 8 T. Rep. 573. 10 Co. 92. 6 Co. 38. Thus a bill of sale pleaded as inducement in case for fraud in sale of goods —

According to the practice of Connecticut a profert in pleading is never necessary. The only reason, by C. L. of, why a profert being that the party may have oyer and the court inspect — our Courts say that oyer is demandable in all cases where profert is necessary

Taken by proper affr of the c.l. but the court will not order it into the hands of the adverse party for him or his counsel to copy the practice is for him to have it removed by the entry of the owner or his counsel —

cspary at C. L. / Root 566.

Formerly in Eng. the omission of a profert when necspary was a cupet in substance but now by Stat. 16 to & 17 Ch. 2d and 4 & 5 Ann the two great statutes of amendments and profers. it can be reached only by special demurrer and if the party does not thus demur he waivs it. Cro Jac. 32. Hob. 301. Cro. Eliz 217. (Format C. L. Hutton 54.) 4 Bac. 113.

When profert of an instrument is made the adverse party may crave oyer of it. i.e. to hear it read as void imports. and this is not all. he has a right to have a copy of it at his own expense for his own use. Hob. 217. Lowe 96. 3 Bl. 299.

But a party is not entitled to oyer of a deed tho pleaded with a profert if the pleader does not make title under it and the profert being unnecspary is mere surplusage — but if he forms his title a defence on it the adverse party is entitled to oyer. Salk 497. 2 Wils 395. Doug. 476.7. Tidd 529.

The ordering or granting of oyer by the Court when not demanded is not error. it does no harm to any one, as it only shewing an instrument in Court a little sooner than it would be necspary to exhibit it in the course of the trial.

But on the other hand refusal by the Court to grant oyer when it is demanded & ought to be granted is error — for the party is thus deprived of an evident advantage and is subject to damage & injury in consequence of it. Salk 498. 1 Saund. 9. b.

This prayer of oyer when entered on the record is in the nature of a plea & the adverse party may counterplead it or demur & the court will pronounce judgment on it.

But to avail himself of this nor the party must enter his prayer or craving upon the record, and the refusal of the court must appear there also. Salk 498. 6 Mod 28. Ld Ray. 969. 1 Saund. 96. Lans 99.

When a deed or bill of exchange or promissory note or other instrument is lost or destroyed its sup. a copy of it sworn to or even parol evidence is admitted to prove its contents. Chit. 205. 6 10 b. 92. b. Ld Ray 731. 1 Ath 446 Peake Ev. 29. 30. sic 1 Esp 337. 1 Wils 324. 6 Vez Junr 812. 7 East 65. 8 East 273. 1 East 347.

But it must first be made to appear probable to the court that it is actually lost or destroyed. Plff's ought not admissable to prove the loss. Coleman v Wolcott S^t of Errors 1800 — The case in Strange 1186 is matter of practice only —

The same evidence is admitted where the instrument is in the hands of the adverse party: but notice must first be given to him to produce it. otherwise secondary ev is not admitted. Chit 206. 1 Esp. Rep. 50.

When oyer is granted the party obtaining it, may enter it verbatim on the record, and then shew any insufficiency or illegality in the instrument, may take advantage of any condition, exception, or other thing not stated by the opposite party, as the condition of a penal bond, and shew any repugnancy or variance made by the Plff in his pleading 3 Bl. 299. 6 Mod. 28. 2 Bac. 113. Lans 98. 9.

If the ins-

trument when recited appears on the face of it to be insufficient or illegal. the party who recites it may demur.

If on the other hand. the defect does not thus appear. he can take advantage of it only by averment of the fact. 2 Wils 342. Laws 99.

But he who recites an instrument on the record upon oyer must recite it correctly at his peril. and if he does not the adverse party may take judgt. as for want of a plea or nil dicit Laws 100. 1. 2. for he fails of informing the condition upon which oyer was granted. For every party craving oyer impliedly undertakes to set out the instrument as it is. Laws. 100.

Another way to take advantage of such misrecital is. for the party making profert. to procure it to be enrolled in his own replication or other pleadings by some officer of the court and then to demur to the pleadings of the party who misrecites it. 1 Stra. 227. 1 Saund. 9. b. 316. 317. Carth 301. 4 T. Rep. 370 Com. Dig. Pl. P. 1. —

Departure.—

Departure in pleading is the desertion of a former defence or claim, for an other distinct from the former and not fortifying it. this is a fault. for every subsequent plea should fortify the former. as a replication should fortify the declaration against a plea in bar. and every rejoinder the plea agt. the replication &c. 3 Bl. 310 1 Inst. 303. 4. Bull. N. P. 17. Laws 163. Plow. 105. 2 H Bl. 280 Lo Ray 1449. Stra 422. 5 Com. Dig 123. Ray 22.

Ex. one declares upon a feoffment in fee and in answer

to a plea in bar relies upon a gift in tail or a conveyance by lease & release this abandoning his first ground it is a departure and the party making it fails for the declaration is the foundation of all subsequent allegations on part of Plff—

So if the matter first alleged is pleaded as at C. L. a subsequent plea supporting it by particular custom is a departure. Ex. act. on an indenture of apprenticeship. in common form. Plea infancy then a replication of the custom of London would constitute a departure. 1 Lev. 81. 1 Keb. 376. 469. 512.

So a plea asserting a right at C. L. is not justified by one other shewing a stat right. Ex trespass for taking beasts. plea damage feasant. Repl. Dff. drove them out of the county. this is a departure for the driving &c is only actionable by the Stat of Marlbo. 3 Lev. 48. 4 Bac. 123.

But if one party pleads a Stat. and the other answers that it has been repealed the former may reply that it has been revived. this is no departure for it fortifies the first as it was pleaded & on the same ground 1 Lev. 81 4 Bac. 123

So if in act. of covenant broken Defs. pleads performance generally. Plff replies non performance in a particular point. Defs. rejoins that he was ready to perform but that Plff prevented the actual performance. this constitutes a departure. the matter is not pursuant. it is one thing to do and another to offer. he should have pleaded this before as my Lord Coke says. 1 Inst. 304. a. 1 Sid. 10. Stra. 442. 4 Bac. 123. 5 Com. 99

So too in an act. on

contract. Defts pleads infancy. Pltff replies a promise after coming of age. & thereupon Defts rejoins a release. it is a departure. since Defts abandons his first plea & substitutes another & distinct one. Stra 402

Pltff declares by Bill in Equity & Errors assigned on an agreement to purchase of Pltff stock of U.S. Bank. Declaration avers a tender of the stock at N. York. Plea law of U.S. requiring all transfers to be made at the bank at Philadelphia. Replication tender at the bank at Phila. Held no departure. Plea first alledged not material see Sal. 222. 2 Bac. 125. 6 Mod. 115. ... it will be seen that as to things immaterial the law does not recognize a departure. a variance from some immaterial circumstances alleged before is at any rate no substantial departure. tho it may be informal.

A novel assignment if properly made is no departure. Thus where the gravamen or cause of action is alledged generally in the Decl. and an evasive plea which is prima facie good. is given, a more particular statement is made in the replication this is no departure.

So to of the other discription of novel assignments to wit. making that the gravamen in the replication which in Decl. appears as matter of inducement only. as in the case of Pltff at ante. this is no departure. — Bull. N. P. 17 3 Wils 20. 1 Saund 28. note. 2 Saund. 5 a & b. 3 Bac. 311.

I would here observe that the Pltff may now assign with or without taking issue on the plea. Dane 240 1 T. Rep. 479. 636 Story 523. 4

A departure vitiates the plea

as I conceive clearly on general demurrer as well as on special. according both to principle and the current of authorities. But the books are not very explicit on this subject. Salk 2 21. 2. Ray 22. 92. Stra. 422. Cro 6th 165 or 288.

A departure is cured by verdict upon the supposition that there appears upon the whole record sufficient to entitle the party to Judgt But if the thing constituting the departure is immaterial he cannot have judgt for he can have it only when the thing constituting the departure is a sufficient ground for the verdict. Ray 86. 1 Lev. 110. 2 Saund. 84. 1 Saund. 117. Dodd 689.

Why then, it is asked, if departure not cured by general demurrer as a demurrer is a confession of fact. I answer that a demurrer does not confess facts that are ill pleaded. Thus in an act. on contract if Defr pleads infancy. Plff replies necessaries Defr rejoins a release, and Plff demurs. the departure on the part of Defr will vitiate the plea. because the release is ill pleaded it might have been such a release as if well pleaded would have entitled the Defr to recover and it appear on the record. but in such an unlawyer like manner that demurrer to it by Plff is not such a confession of the fact as to entitle the Defr to recover — But as the release is in itself a good ground of defence if Plff does not demur but takes issue on the rejoinder and the release is found by verdict. Defr shall have judgt 1 Lev 110. 1 Keb. 566.

Demurrer

It is a little remarkable that there is no definition of demurrer to be found in the books — there is certainly none in any of the books

that I have seen — Mr Lawes calls it an irregular collateral part of the pleadings. Others call it an issue in law. Mr Bla. for instance 3°. 314

Both these are incorrect —

A demurrer is merely a denial of the legal sufficiency of the allegations summed to.

It admits such matter of fact alleged by the adverse party as are well pleaded, but denies their legal sufficiency to entitle the party making them and refers the question of law arising from them to the Court in distinction from the jury. It is a thing altogether different from a plea. for it advances a legal proposition namely that the allegations on the other side are insufficient in law but a plea either affirms or denies some matter of fact. 3. Bl. 314. 1 Inst^t. 71 b. Com. Dig. "Pl." (2) & (2.) 5 Hob. 233. 1 Saund 338. note 3.

Instructions that a demurrer is not plea it appears indeed from the very form of it to be only an excuse for not pleading for the party demurring, says. that the allegations are wholly or in no wise sufficient in law that he is not bound by the law of the land [redacted] to make answer and of this prays the judg^t of the court. 3 Bl. abr. 23. & 3 Wils 292. Lawes. 42. —

Demurrer may be taken to any part of the pleadings. Decl^n. Repl^n. plea in bar or any other part. 1 Inst^t. 72. a. & Bac. 129. 5 Mod 132.

A demurrer specially or general admits at C.L. no other facts than such as are well pleaded both in point of matter and form. But since the Statute 27th Eliz & 4 & 5 Anne. a general demurrer

admits all such informal statements as are aided by those statutes. and in general they aid all formal defects — so that the rule seems to be since those statutes that a general demurrer does not affect mere informalities. in other words a general demurrer confesses those allegations which are sufficient in substance although they may be informal but does not confess those that are substantially defective. For the 6 L rule see Hob. 56. 233. for that rule see Laws 167. 1 Saund 338. Com. Dig. Pl. 2 5.7. 1 Bac. 94. 5.

Then if in an act. of covenant broken Plff assigns some breaches well and others ill. Defts demurs. Plff has judgt only for those well assigned for the general demurrer does not confess if it is ill in substance. but if it is ill in form only general demurrer does confess it. but a special demurrer does not confess it in either case. 1 Wils. 248. Salk. 218. 2 Saund 279. 280. Hob. 56. 233. 1 Sid. 10 Laws 167. to 169. Com. Dig. Pl. 2. 3. 4 Bac. 131. 5 Com 139 1 Saund 285. Cro. C. 557. Holt. 191.

But this rule that a demurrer does not confess facts which are ill pleaded must be understood with a little qualification. — a demurrer must confess facts so pleaded for the sake of argument and to determine the issue whether those facts are sufficient in law although such confession does not conclude the party. So where to an act. on bond Defts pleads a release, without stating it to have been by deed — here the Plff from the very nature of things must confess a release by parol or the validity of such release could never be tried

For the reason above stated a Demurrer never confesses an averment which contradicts what before appears certain on the record. Thus a party contradicts his former plea. the party demurring does not confess the latter allegation. So one pleads a record to which he was a party and then makes an averment inconsistent with it. Here the matter alleged is not well pleaded. for the averment is inadmissable on the ground of estoppel 3 Lev. 124. 6 vr Ch.' 35. Lawes 168.

A demurrer it is said does not confess an averment of what is impossible. there are no examples of this but it is no doubt correct. 1 Sid 10. Com. Dig. Pl. 2.6 Lawes 168.

Again a demurrer never confesses facts that are incapable of legal proof. as in case of the record supra. the averment of such fact is in itself a good ground of demurrer. as if a party make an averment against matter of estoppel on the record a demurrer thereto does not confess the averment — So if a release is pleaded to debt or bond without shewing it to be by deed the party demurring does not conclude himself. 1 Sid 10. Lawes 48. 66. 44a Yelv 122. 6 vr Ch. 254.

Allegations that are not material or immaterial are not confessed by demurrer. such allegations you will recollect cannot be traversed. and what a party by the rules of pleading cannot deny he does not admit by not denying nor of course by demurrer. Salk 561. Lawes 168. 4 Bac. 131 5 Com. Dig. 139.

Demurrer never admits conclusions of law deduced by the adverse party from facts stated. it admits facts

only. Thus if to an act. on bond Defr. plead a special non est factum. that he was an infant. — a demurr confesses the fact of infancy but not that it is not his deed. that the judges must determine —

Again in trespass Defr. pleads justification a process virtute cujus he took the things in question as by law he had a right to do — his demurr does not admit the influence of law deduced by Defr. that is left for the court to determine from the facts admitted. Hob. 56 4 Bac. 131.

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After an issue in fact is joined there can be no demurr on either side for an issue with similitude closes the pleadings. 1 Shower. 213.

Mr Justice Blackstone observes that a demurr is an issue in law. this is not correct. it merely tenders an issue in law. Defr. says Decl. is not sufficient in law. Plff replies that it is sufficient in law & then the issue is formed. — for an issue is only formed when there is a joinder in demurr. 3 Bl. 314. 315. indeed Mr. Bl. reckoned without his host. see 3. vol. 313. — 1 Inst 126. a. Law 43. 4 Bac. 54

When an issue in law & in fact are both joined in one case as they may be in different parts of the declaration. plea &c. the issue in law is first tried. usually it is however a matter of practice and discretion any with the court. — 1 Inst. 72. a. 125. b. Palmer 517. 4 Bac. 130. 5 Com. 136.

It is a general rule that there can-

The better opinion is that no man shall receive sentence of death
[illegible] to an indictment.

not be a demurrer on a demurrer it works a discontinuance
Thus if Defr. says. that the Decr is insufficient in law it
would be nonsense for Plff to say that the Defts demurrer was
insufficient in law. L.d Ray. 20. Salk. 219. Comb 306. Law
172.

It is said by Lord Holt that there is an exception to this
rule when a demurrer to a plea in abat. is not apposite.
Judge Gould formerly considered this exception unintelligible and
that there was no such exception. but now the Ld it is dayaidays
to dispute the word of a man like my Ld Holt. — there is an
example of it in New Reports. Defr pleaded misnomer in
abatement. Plff replied that bail had been entred for Defr by
the same name as that by which he was sued. Defts demurred to the plea
the bail bond on the record and demurred to the Plffs demurrer
the Defr not having been party to the roguisance. but Judge Gould respondeat ouster.
2 N. Rep 453. Law 172. See L.d Holts rule Comb 306. contra
Salk 219. i.e. This is an anomala and in all other cases
the rule is explicit that the party demurred upon must join in demurrer
for the form see 3 Bl. appx. 23. L. Law 172. 4 Bac. 130.

In civil cases
judgt on demurrer, except to a dilatory plea, is peremptory
i.e. in chief or final. 4 Bac. 132. Dyer 306. Dyer 69. 341

So in criminal case short of felony. 4 Bac. 132. &c.
2 Hale. 259. Com 257/243. 315
Ely 196. 2 Hawk. 334. 11 Co. 60. So that Defr cannot plead
over unless the prosecutor permits. he cannot demand it, neither
can the court grant it unless by such permission — 2 Bl 334. 338

But in all
capital prosecutions the humanity of the law allows the
Defr after demurrer overruled to plead over the gen.l issue or

a special plea in bar. thus forming an exception to the gen. rule in favorem vitae — the authorities are not all agreed as to this point but this seems the better opinion. 4 Bl. 332 338. 2 Hawk 334. 2 Hale 239. 243. 257. 315. Co. Ely 196.

Demurrers are of two kinds. general and special. 1 Inst. 72.

A demurrer not assigning specially any cause for demurring is a general demurrer. on the other hand. one which points out specially the particular defect on which it is founded is a special demurrer. 4 Bac. 132. Laws 167. 168.

W Law says that special demurrers were introduced by the Stat 27 Eliz. — The fact is that anciently there were no other demurrers than special ones so that W Law is mistaken. Ld Holt observes in 2 Buls. 267. that all demurrers ought to be special. not meaning however that the law is so. — 1 Vent. 240.

Special demurrers were made necessary in many cases. by this Stat. in which, before, a gen.^l demurrer would do as well — for then a gen.^l demurrer would reach formal errors — but since the Stat formal errors can be taken advantage of only by special demurrer. Hob. 232. 1 Saund 337. b. 1 Vent. 240.

In some States that Statute may not be in force. when it is not Demurrers in this respect are regulated by C. L. —

These statutes do not extend to informations, as these are penal statutes
as appeals or indictments. Com. Dig. "Pl." (2) 7.

To constitute a special demurrer the cause assigned must be set forth specially. mere assigning a cause does not such it special. . Thus if Defr. says that the decn. & the matter therein contained are insufficient in law. & that the decn. is uncertain and wants form. & so the demurrer gen. the party demurring specially must in the words of L.d Holt put his finger upon the point — neither does it constitute special demurrer to say the Decn. is double — the rule then for special demurrers is that there must be a cause not only assigned but it must be specially set forth. 1 Wils. 219 Comb. 297. 1 Show. 242. 2 Ld. Ray. 798. 5 Bac. Abr. 464. 466.

I would here observe that a special demurrer reaches all defects that a genral demurrer does and some that a genral one does not. — for as to those defects not specially assigned it stands as a genral demurrer.

The rule then is. that all defects in substance are reached as well by genral as by special demurrer by a substantial defect I here mean. the omission of such things as are material to the right of action or defence as in an act.n on contract, consideration. in trover conversion in trespass possession &c. in such cases a gen.l demurrer is as good as a special one.

But by the Statute 27 Eliz.th & 2.d & 5 Ann defects in form are reached by special demurrer only. this is a statute rule merely at C. L it was not. 10 Co. 88. Latch 185. Stra. 624. 3 Bl. 315. Laws 167. to 169. Com. Dig. Pl. 2. 5 & 6. Co. Lit. 72 a Hob. 127. 164. Hutt. 15. 5 Mod. 18

4 Bac. 132.3 Salk. 291. see this stat recited at length in 1 Bac 924. 5—

It is here to be observed that in all pleadings there are two requisites viz. 1st That the matter of fact pleaded must be sufficient in law. — 2d That this matter be alleged according to the forms of law. the want of either of these requisits is a good cause of demurrer — The want of the first viz matter or substance is most properly reached by general demurrer — a deficiency in the matter or want of form can only be reached by special demurrer. 1 Inst. 303. 4. Hob. 164. 232. 4 Bac. 2.[133] 2d Ray 798. 802. ——

I am not certain that a very definition of a defect in form or substance as the cause of demurrer can make it more clear than the distinction before given — but I would further observe that

The omission of that without which "the very right does not sufficiently appear." is a defect in substance. by "the very right" is meant the ground of demand or defence —

On the other hand the omission of that without which the very right does sufficiently appear, tho not alleged according to the forms of law is merely a formal defect. Hob. 232. 3.

Examples of defect in substance. If a Plff whose right of action depends upon the performance of a condition precedent, omits to aver the performance, he fails of stating his very right — so if in an act on contract Plff omits consideration — so in slander if Plff omits to aver that the words were falsely and maliciously spoken. so in an act.

Lee affraunty contra. Hob. 301. 233. 4 Bac 135.

of which scienter is the gist. as for mischief done by dog or other tame animal if the gist is not stated the Pltff omits his very right. — these are defects in substance and are to be taken advantage of by general demurrer — but if those things appeared. but informally there would be ground for special demurrer only.

Suppose a decl^n is double, is this a defect in form or substance? if any thing it must be a fault in form — it is not a defect or want of substance, the error is the other way too much substance. thus if debt and tort be joined — So in transitory actions as Ass^t & battery if the venue is omitted, or the gist appears it is only by a formal defect 4 Bac. 2. 119. 134. 5

So you perceive that when there is a total want of substance, as if one should sue another in slander for calling him a jew or a methodist general demurrer is sufficient for it is such a want of substance that no form will make the offence words actionable. — So too if a material allegation is omitted as if in trover Pltff omits property or conversion or in trespass possession a general demurrer in these cases will reach the defect as well as a special one 1 Saust. 72. a Hob. 133. 198. 232. 301. 3 Bl. 394. Carth 389. 1 Sid. 184. 1 Com. 138. Stra. 624.

If a party plead a fact which from the face of the record he is estopped to plead. a general demurrer is sufficient. if it is a substantial fault, the objection is not to the form but to the averment in any

form - for no form of words can make it good. Will 13 Sam 38. 140. 146. 158. 161. 170. - Or the other party may reply the matter & estop him specially Sam 131. Will. 13.

Special demurrer reaches no other formal defects than such as are specially assigned for the cause of demurrer and as to such defects as are not thus assigned it will be a general demurrer. Thus in support there are two formal defects in the Decn as want of venue and duplicity. Defts demurs to the want of venue setting it forth specially without noticing the duplicity the demurrer as to the duplicity is general 10 Co. 88. 4 Bac. 132

I have formerly in this place given a collection of rules as to the effect of judgt on demurrer but as they belong more properly to the title of evidence I shall now only give the genl rule & refer you to my title of evidence for a more full consideration of the subject -

Genl Rule. On demurrer to the Decn if judgt is given for Defts no similar or concurrent action can afterwards be sustained for the same cause i.e. on the same grounds as were disclosed in the first declaration. for a final judgt deciding the right in question must decide the controversy or litigations would be endless. it is an effectual a bar to another action for same cause on the same ground as a judgt upon a plea to the action. 4. Bac. 116. Co Eliz 668. 6 Co. 7. 2 Bl. Rep 827. Peakes Ev. 36.

Action if Pltf

failed in the first action for want of an essential allegation in the first Decl.n and which is inserted in the second for the ground disclosed is different from the former. the Pl.ff failed in the first action not on the legal merits of his case as described in the record. so if the first action was misconceived Ex. Trespass for trover, but the second action was not concurrent. the right claimed in the 2d could not be decided in the first. 4 Bac 115. 6. 6 Mod. 20. 66.7. Cro Eliz 35. Hutt 81. 3 Wil 241. 304. Esp 165 2 Bl. Rep 779. 827. 31. Cro Eliz 667. 8 2 Vent 169. Ray 472 2 Mod. 318. 3 Mod. 1. —

But a judg.t ag.t Pl.ff in one real act.n is no bar to another of a higher nature to try his right to the same subject. for the action are not similar nor concurrent nor his right the same 4 Bac. 115. 66.7

This rule cannot obtain in Com. for we have but one real action. viz disseizin. indeed that is in strictness rather a mixed action. tho usually called real — but tho the Decl.n be imperfect through a mistake in pleading yet if Defft take no advantage of it but plead a plea in bar upon which Pl.ff takes issue & the right of the matter is found for Defft Pl.ff shall have no other action for the same cause — the merits have been tried and the right decided. 4 Bac. 116. 6 Mod 207. Ex to one insufficient Decl.n Defft pleads a release & it is found for him. so if the plea in bring good is demurred to & thus confessed by Pl.ff same rule. —

, But a recovery 4 ct for f. and cruelty recom-

minding B. is no bar to an act. vs. D on the contract obtained by the recommendation Esh. Rep. 208. 1 Day 22. Peake Ev. 172 Peake Rep 134.

Demurr should intend to the whole of the Dec. Plea &c unless a part of it is otherwise answered & should be coextensive with the part not otherwise answered if not it is a discontinuance. Laws 135. 6. 161. 2. 6. Wilk 481.

A demurrer reaches back upon the whole record as every issue in law does & attaches upon the first substantial defect in the pleadings.

Hence although the parties join in Dem. on a single point as wh. a special plea &c the Ct. will go back to the Dec. for the first defect is fatal and decides the issue. Thus if Dec. is bad and plea is bad & Plff demurs to it. still Defts. shall have judgt. for a bad plea is good enough for a bad Dec.

Ag. Dec. is good. but the plea is bad and the repl. is bad & Defts. demurs to it. Plff shall have judgt. for the same reason. Com. Dig. Pl. 2. 7 Salk 519. 4 58. 640 1 Saund 285 note. Hob. 86. 199. 200. 5 Co. 52 b 9 Co. 110. 8 Co. 120. 133 b 4 Bac. 131. 2 Ld Ray 1080. 3 Lev 244. 2 Vent. 79.

As to the mode of entering up judgment see arrest. 2 Wilk 150. 1 Saund. 285 n. Com. Dig. Pl. 3. 37.

Thus is a single class of cases that does not correspond with those examples I referred to viz. on a penal bond for the performance of covenants, awarded &c in such an act. although the Dec. is good and Defts. plea is bad, yet if Plts. replication is ill as not stating a sufficient breach & Defts. demurs to it he shall have judgt.

for in this case the cause of act. does not appear until the replication. for Plff says nothing of the condition in his Decl. This case an altogether sui generis. and the rule is in actty it seems as if the defect had appeared in the Decl. 3 Co. 52 8 Co. 120 b Cro. Jac. 133. 221. Ld. Ray. 1080. 2 Bulst. 94.

And when under the Statute for double pleading there are two pleas given to one Decl. if one is judged good on demurrer Defts. shall have judg. tho the issue on the other is found for Plff. For there is one sufficient defence. and it appears from the whole record that Plff ought to be barred. 1 Saund 80. 2 Burr. 749.

Thus far of demurrer to pleadings — I am now to speak of —

Demurrer to Evidence. In certain cases when the pleadings terminate in an issue in fact, one party may take the cause from the determination of the jury and refer it to the court by demurring to the evidence which the adverse party brings to support his claim or defence. it was not until very lately that this kind of demurrer was thoroughly understood. 1 Inst. 72. Bull N. P. 313. Ray 404. Allen 18.

Demurrer to evidence is always to be taken before the party demurring exhibits any evidence on his side. unless indeed he will waive his evidence for the purpose of demurring 1 Root. 570.

It must be taken to the whole of the evidence exhibited on the side to support the issue. for the whole of the evidence might support the issue when a part would not and I suppose it can be taken to the evidence of that party

only who takes the onus probandi. Ex. If in an act. founded on deed Defdt. should think the deed defective in form, he could under a non est factum demur to it as evidence - but I. see no way in which Pltff could demur to the evidence of Defdt.

I would here observe that the relevancy of evidence. i.e whether it conduces to prove the issue. is now matter of law to be determined by the Court. - But when its relevancy is established. the extent of it i.e. how far it goes to support the issue is to be left to the jury. Doug. 300. 2 Hen. Bl. 205. - . This rule has been often misunderstood and demurrers to evidence overruled & replications awarded through the ignorance of judges.

It follows then that it can never be proper to demur to evidence that is clearly relevant to the whole issue. however weak it may be. for the court cannot determine its strength or weakness. it is its relevancy of which they judge - and evidence is always relevant to any issue which it conduces in any degree to prove. 2 H. Bl. 205.-

Now if the party who takes the burden of proof has two points or facts to establish. if he produces the least particle of proof of both facts to be proved the opposite party cannot demur - i.e. he is a fool if he does. -

But if all the evidence goes to one point only & does not at all apply to the other. it is demurrable for then is no evidence applicable to the whole issue or relevant to it - so the party may safely demur.

In the matter of the thing thereof the fact must be first ascertained. till that is done the question of law cannot arise on the demurr
2 Ann. 36. 205. 6.

By the relevancy of evidence is meant its conducing in any degree to prove the issue. this is to be determined by the court its strength or weakness is to be left entirely to the jury. if it does at all conduce to prove the issue it is relevant. 2 Hen. Bl. 305.

I am not now speaking of the admissibility of evidence. evidence may be relevant when it is inadmissible. thus parol testimony may be perfectly relevant when it cannot be admissible. admissibility of evidence is much broader ground than its relevancy.

The relevancy of evidence is easily determined and is to be determined entirely by the discretion of the court.

A demurrer to evidence puts an end to the question of fact and refers to the court the application of the law to the facts shewn in evidence. it necessarily admits the facts shewn in evidence by the adverse party and like other demurrers admits their legal operation in his favour. i.e. their sufficiency in law to support the issue. 4 Bac. 136. 1 Inst. 72. 2 Hen. Bl. 205. 6. 2 Johns. 146‡

Upon the question under what circumstances the party exhibiting the evidence is bound to join in a demurrer to it the first rule is— When the whole evidence exhibited in support of the issue is written the party exhibiting it must join in demurrer or withdraw the evidence. for by the writing the evidence is made certain so that there can be no variance. Thus when a deed is exhibited in support of a

title. a covenant as evidence of a title. the opposite party may demur if he thinks it insufficient in law to support the claim & the party exhibiting is bound to join in demurrer. 5 Co. 104. a. 6 Co. Eliz. 751. 2. 3 Bl. 372. Bull. N. P. 313. 1 Inst. 72. a. 1 Roll 571. Kirby 106. 4 Bac. 136.

The question how far a party exhibiting parol testimony is bound to join in a Demurrer to it is not fully settled by the old authors. 1 Inst. 72 a. 5 Co. 104. 1 Lev. 87. 6 Co. Eliz. 751. 2. these authorities are contradictory. those who say the party is not bound to join assign as a reason that the evidence being parol is uncertain as may be claimed to be and cannot be properly stated. 4 Bac. 136.

But modern cases have settled this question and given a series of rules applicable to demurrer to parol testimony —

II. That when all the evidence is parol both parties may agree to join in demurrer to it. this rule is not now nor has been questioned 6 Co. Eliz. 752.

III. It is also settled that if one party offers to prove any definite fact by parol the opposite party may, by admitting that fact itself on the record, oblige the party adducing the evidence to waive it or join in demurrer to it. Allen 18. 2 Am. Bl. 206. This is if evidence of neglect in paying rent was offered to establish conversion in an ejectment. If they instead of demurring to the words of the writ Defts will admit the fact of neglect which is meant to be proved them. he may demur to the whole evidence — 2 Am Bl. 206 —

III. It seems settled that if the parol exhibited in sup-

It is for the court to say whether it is sufficiently direct

without this admission of fact. the question of fact must be left to the Ch.

part of the issue is certain. the adverse party by confessing it or the record to be true. may compell his demurrer to receive his evidence or join in a demurrer — by the word certain is here meant direct & explicit as contradistinguished from circumstantial & indeterminate. 2d Am. Bl. 206. a great deal of the evidence offered in court is direct. hence it may be demurred to — but if it is received the party demurring must confess the fact meant to be proved

VII. If the evidence produced is loose and indeterminate. the opposite party cannot demur to it without admitting it to be certain and determinate as well as true. but by admitting this admission on record he may demur whether it be written or parol and the party who produces it must join or waive the evidence. but he is not bound to join without such admission. 5 Co. 104. 2 Am. Bl. 207. Bull. N.P. 213.

By why it may be asked is it necessary to make this admission. I answer. that without such admission the question of fact testified about would not be ascertained but left to the court. Ex Witness says "I believe the fact to be so or so." "according to my best recollection." "that is my impression" &c — and a witness cannot be forced to say more this is what is called loose & indeterminate evidence. and in this case the party demurring should admit and state the evidence as being certain and determinate as well as true. i.e in the same manner as if it were unqualified and positive. otherwise the weight of evidence would be referred to the court for to weite the evidence as it is viz "I believe &c" admitting the

*And if he does join the court cannot render judg.t but must award a venire de novo Bull. 313.

In Cockridge v Cannaway Doug. 126. it is said by Mr Wood agreed by J. Buller ib. 129 that a demurrer to w.ch admits all matter of fact which a jury might find, only brings the decision upon the inference in point of law from those facts before the court. — 1 Lev. 87. an arrest was to be proved - but the writ was not produced. - Def.t demurred to y.e w.nt by the court the writ shd have been produced. but it is confessed by the dem.r the arrest being matter of fact to be proved by matter of record. - the jury might of their own knowledge know the was a writ By the dem.r all matter of fact are confessed that the jury could know of their own cognizance.

evidence to be true, is only admitting that the witness believes the fact to be thus and thus & thus the fact which the evidence conduces to prove is left uncertained so that there is nothing on the record for the demurrer to act on or attach to.

VI. If the evidence produced be circumstantial the party demurring must distinctly admit upon the record every fact and every conclusion which it conduces to prove. He may then demur and the opposite party is bound to join in the demurrer. tho it is proof — if he does not make this admission he cannot demur & if he does the opposite party is not obliged to join. Stils 22. 32. c Mun 18. Bull. N.P. 313. Doug. 114. 127 to 129. 2 Am. Bl. 207. 209.

I would observe that the evidence conduces to prove every fact and conclusion which a jury might infer from it. that is every fact or conclusion to which the evidence offered is relevant. Thus an action was brot against the acceptor of a bill of exchange. Deft pleaded that the payee was a fictitious person, and no doubt if the payee of a bill of exchange is fictitious there can be no endorsement so as to carry interest. The counsel for the Plff attempted, by a variety of circumstances given in evidence to raise the presumption that Deft knew at the time of acceptance the payee to be fictitious. The Deft demurred to the evidence and the Court determined that upon the state of the evidence given for the Plff it was not competent for the

Defr. to demur and oblige the Plff to join without distinctly admitting upon the record every fact and every conclusion which the evidence given for the Plff conduced to prove.

So it seems that the party demurring in this case must admit in his demurrer to the evidence, that he knew the payee to be fictitious and not merely that the evidence is not the materiality of it only. true. otherwise the weight of evidence would be referred to the court for the matter of fact is not ascertained. and if a party does not admit the supposed fact a demurrer cannot stand and a venire de novo must be awarded. as the merits of the case cannot otherwise be determined. Bull N P. 313. 4 Bac. 137. 2 Hen. Bl. 209.

What is said on this subject 2 Swift 257. is not law.

Therefore rules respecting demurrer to parol evidence are established now so as to answer precisely the purpose intended. no undue advantage can be taken of an understanding man— parol evidence may now be demurred to in every possible case if it be properly and skillfully done.—

The point in issue on demurrer to evidence is whether the evidence demurred to is sufficient in law to maintain the issue in fact: hence on such demurrer no advantage can be taken of any defect in the pleadings. for the demurrer does not reach them.

But if there is any substantial defect advantage may be taken of it after the judgt on the demurrer to the evidence. by motion in arrest. the same as after verdict. Doug. 208. 213. Bull. N.P. 313.

The party whose evidence is demurred to may always demur and the judg.t of the court whether he is bound to join in the Dem.r and if there is no colourable cause for demurring the court will not allow it. for it delays the determination of the suit on term which the court as it is a matter of discretion with them will not allow on frivolous pretences — 4 Bac. 136. Bull. N. P. 314. Allyn 18. 2 Rolle Rep 117 2 Am. Bl. 205. 208.

On demurrer to evidence and joinder the usual practice is to discharge the jury immediately and the writ of enquiry is executed afterwards. sometimes however the damages are assessed provisionally before Dem.r determined — it being discretionary with the court — 620 Cl. 143. L.d Ray 60. Plow. 410 Salk 284 Doug. 212. Bull N. P. 314. 2 Am. Bl. 200.

In Con. there is no writ of enquiry. Damages are assessed on demurrer by the court. 1 Root. 570. 2 Swift 258.

If improper evidence, being objected to, is admitted by the judg the party objecting cannot demur for that cause for the Dem.r would call in question interlocutory judg.t — it comes too under a common rule that a party may demur to the whole evidence but cannot select a part for the purpose of demurring — besides it would, in our practice, refer the question of law to the Court that had decided it — — The proper remedy in such case would be by bill of exceptions or motion for a new trial. Salk 284. Bull. N. P. 314.

If the party offering to demur to evidence is overruled, and the other party not permitted to join:

The judgt. on dmrr. to evce is, that the evce is, or is not suffr. to maintain the issue joined. Bull. 313. –

It is laid down in the books that a judgt. on demurrer to evidence cures all defects that a joint verdict does. Judge Gould conceives, that as on dmrr. to evce the facts are stated as on a special verdict. the judgment on it must have the same effect as a special verdict.

the proper remedy is by bill of exception. 9 Co. 13. b. Cro Ch. 249. 102
or 341. 443. 1 Bac. 326. 4 Bac. 136. — for this is an error in interlocutory judgt.

The whole proceeding in demurrer to evidence, as entering the evidence on record, the admissions necessary to be made and all the particulars of practice upon it are under the direction of the court. 2 Hen. Bl. 208. 9. 2 Roll R. 117.

As to the Mode of taking demurrer to evidence you will find precise forms in Bull. N. P. 312. 2 Hen. Bl. 200.

I would observe merely as to the conclusion, that it concludes praying judgt that for want of sufficient matter advanced to prove the issue, the jury may be discharged from giving in a verdict, & this praying judgt in the common form.

Arrest of Judgement and Repleader

To arrest judgt is to stop or stay it. This is done on motion, reduced to writing and entered on the record.

This proceeding is usually had only after issue in fact tried and verdict found.

This however is not universally the case, for judgt may be arrested after default or after demurrer to evidence determined as we have just seen. 3 Bl. 386. 393. Stra 1271. 2 Burr. 900 Doug. 208. 213.

It is a matter of consequence thoroughly to understand the use and object of arrest of judgement.

Now the principle on which judgt is

arrested is, in every case, this — That as the judg.t of the court is always a mere conclusion of law from the facts as entered upon the record, it follows, as the judg.t is founded on the whole record, that he who does not appear on examination of the whole as entitled to judg.t shall not have it, although there has been a verdict in his favour. a demur.r to evidence been determined for him or the adverse party made a default.

Ex. ct brings an act.n against B. his dec.n is radically wrong. B. joins issue upon it and it is found against him in verdict. now. B may arrest the judg.t for the verdict merely finds the facts alleged in the Dec.n but if the facts thus stated contain no cause of action. Plff can have no right to recover and the court cannot pronounce judg.t

The issue raised by motion in arrest of judg.t at. C.L. is an issue in law — for judg.t can be arrested (in Engl) for intrinsic cause. that is such as appear on the face of the record as in the case above supposed.

Or suppose the Dec.n varies from the writ then the Def.t pleads to the issue and Plff obtains a verdict. he shall not have judg.t for the variance destroys the right of recovery. 3. Bl. 393.

So when the verdict varies materially from the issue. judg.t must be arrested. for in such case the verdict is not found either way. the jury have not done their duty for the facts in issue are not determined. Ex. slander for the words "he is a bankrupt." verdict "he will be a bankrupt" upon the words spoken. 3 Bl. 393

The rule is the same if Dec^n is wholly or substantially defective. Plff cannot have judg^t tho he may have obtained a verdict. as in the first Ex under arrest. same with. —

On the other hand. if Deft^s plea on which he has obtained verdict contains or discloses no legal defence to the action. when the Dec^n is good. judg^t may be arrested by the Plff. Thus if to an act^n of debt. Deft^s pleads "not guilty" and the jury find not guilty. — the verdict answers no purpose Plff never said he was guilty — So if to an act^n on contract. Deft^s pleads he is. and always has been ready to perform & Plff takes issue upon it. and verdict is found for Deft^s it answers no purpose for to do it, is one thing and to be ready to do it, another. 3 Bl. 395. 6 to Eliz 778.

As to the cause upon which judg^t may be arrested after verdict the rule is this — After verdict judg^t may be arrested for any cause which might be assigned after verdict and judg^t for error. —

A much more intelligible explanation and the one which I choose to adopt is this If judgement in pursuance of the verdict would be wrong that is not warranted by the rules of law. judg^t may be arrested.

Whatever thing would support a writ of error in favour of him against whom the verdict is found will support a motion in arrest. Salk. 77. 2 Rolle 716.

To determine what would be error after verdict the following is the

Gennal Rule. If the statement of Plffs title a cause of action and that only is defective, the defect is aided by verdict and judgt cannot be arrested. 3 Bl. 392. Doug. 658. or 671 the case of Rushton agt Aspinall in which there are some learned observations by L.M ans pits.— Salk 365. Bull N. P. 320. Comyns 825 Com. Dig. Pl. C. 87. Stra 232. 1023. Plow. 262. 5 Bac 317. Cowp 389. Civ Ja. 311. 428.

This rule however is so gennal that without illustration it would not assist the student.— Ex. In trespass the Plff omits all the necessary allegations except he does not lay a day certain in his decln now on demurrer it is (at C.L only gennal) or special this Decln would be bad. but this defect will not support a motion in arrest. the trespass or cause of action fully appears. the statement of it only is defective & this defect is aided by verdict.— so omission of value in trover.

On the other hand if no title a cause of actn is stated or one which on the face of it is insufficient or defective. it is not aided by verdict. Ex Plff alleges a grant of an incorporeal right by parol. judgt will be arrested for such a grant cannot be by parol. 1 Ld. vid Ch. Pl. 402.

Again Plff alleges that Defr called him a jew and I will suppose the Decln as good with the most critical nicety and verdict is found for Plff judgt must be arrested for the offence is not actionable and no form of words in the declaration can make it so—

Suppose in Trespass. Plff admits to the possession judgt must be arrested. for trespass is the violation of a mans possession. 3 Bl. 394. 1 Sid 184.

Doug. 658.

Suppose that in an act. of slander Plff does not allege that the words were spoken falsely and maliciously judg.t must be arrested for unless the words spoken were both false and maliciously they are not actionable — Thus far of the Decl.n

The same distinction applies mutatis mutandis to the defence pleaded by Deft. that if the defect is in the defence itself he cannot have judg.t but if it is in the statement of it only it is aided by verdict. Thus if to an act.n of debt, viz. ante, Defr. pleads not guilty & jury find for him. for this is nothing denied or avoided that Plff has alleged. 3 Bl. 395. Cro Eliz 778. 1 T. Rep. 145. 545. 4 T. Rep 272. 7 T. Rep. 518. 3 Burr. 1728. Bull. N. P. 320. Cro Car. 297. Salk 130. 365. Carth 389. 1 Mod 292

This distinction above made is very important and to be understood and I do not know how it happens but it often confounds practitioners and students as much as the distinction between a traverse upon a traverse & a traverse after a traverse — it is however very intelligible. —

It is a general and invariable rule that any defect in pleading which will support a motion in arrest of judg.t must be such as would have been fatal on Gen.l demurrer. 3 Bl. 393. 4

But the converse will not hold e converso for it is not universally true that whatever will support a gen.l demurrer will support a motion in arrest. For if the Def.t pleads &c omit some particular circum-

stance without proving which the party obtaining verdict ought not to have obtained it but which is implied from those facts which are alleged & found. the omission is aided by verdict, judg. shall not be arrested tho the pleadings were ill & the defect would have been fatal on gen. demurr. Ex. omitting to state the value of goods in trespass. so too if the Plff omit the day certain in his dec. for trespass there were at C.L. would have been fatal on gen. demurr. but are no foundation for a motion in arrest. 5 Bac. 196. Lev 95. 44. Cro Car 389. 3 Bl. 394. Ep 407

For the jury in ascertaining the damages are supposed to have found the value in the one case and the day certain in the other.

Now this doctrine of the verdict curing the defect in the pleading is founded in the strictest sense and is not a mere arbitrary rule of law. Thus suppose Plff lays no damages. if the jury ask damages. it is a fair presumption that the value and amt of damages were proved to them. and thus the verdict by fair intendment supplies the omission.

Sir Plff alleges the grant of an incorporeal hereditament without alleging it to have been by deed. now if the jury find the grant. it is to be presumed they found it on good evidence viz a written instrument. Stat. 5 4 5. Bac. 317. 196. 321 10 Mod. 301 2 Wils 376. 3 Bl. 394. Carth. 389.

The grounds on which the pleadings are aided according to the above distinction, is. that after verdict the court must presume. that all facts not alleged. which however are necessarily implied from those that are alledged & found. were proved to the jury

The verdict by necessary intendment or implication supplies the omission.

Or if he waives future day, the presumption that the verdict may be found was for trespass committed after the date of the writ, is not admitted for that would be to suppose that the court committed improper &c.

on trial — Or

In other words. the court must presume in support of the verdict every thing which. in point of fact is necessary to warrant the finding. that is every thing which it was necessary to prove to found the verdict on. Bull: N.P. 320 Dom. 671 658. 1 T. Rep. 145. Stra. 1023. Comp. 827. 1 Wils 17 2. 1 Saund. 228. n. 1

This governing principle is well understood. the motion of arrest & the distinctions taken in the books are very easily understood. — The verdict you will observe supplies the omission in the pleadings — Thus if in Trespass. Plff omits to lay a day certain in his Dec. the defect would be ill on gen. Demur. at C.L. but verdict will aid it. for it is a fair intendment and presumption for the court to make that the jury had sufficient proof that the trespass was committed before the date of the writ or suit brought — Carth 389. Salk 662 130. 3 Bl. 394. 7 Mod Rep 518. 1 T. Rep 545. 2 Barnw. 2455 1 Mod 169 292. 5 Mod. 287. 5 Bac 317. Stra. 212. Ld Ray 810 Cro. Ch^s 497.

Thus is an example frequently given in our books which is not adapted to the case. viz. a profert pleaded without averment of livery. it is said and even by Bulle that if the verdict find the profert. the court will presume the jury had proof of livery. because it is a necessary part of the profert. see 1 T. Rep. 145. 5 Bac. 317. Mutt 52.

The fact is there is no riding in this case. the pleadings and none for they are good even on special demurrer — for alleging a profert is of course alleging a

Livery 1 Inst. 303 b. Cro. Jac. 211. Plow. 14 q. 8 Co. 82. b. Cam. 48 Cro. Eliz. 401. Com. Dig. "Pl." E 9. Ray 487. Salk 130. 1 Vent. 107 4 T. Rep. 472. Chit. Pl. 5

Thus will presume that the verdict is said to cure the pleadings by ascertaining those facts, which for the inaccuracy of the pleadings did not appear.

On the other hand nothing can be presumed to have been proved except those facts that are alleged and found by the verdict and such as must or are necessarily implied from them. Hence if the cause of action or title itself is substantially defective that is any indispensable requisite is omitted, the defect cannot be aided. 3 Burr. 1728. 3 Bl. 394. Doug. 658.

Ex. act. for calling a man a jew and jury find the Defd. did call Plff a jew the court could not presume that he called him thief. indeed there is no fact to be presumed from such verdict which could make the words actionable.

So if any fact is omitted which is essential to the right of action or defence and which are not inferable from those facts which are stated & found in the verdict. the fault is not cured. for the fact omitted cannot be presumed to have been proved to the jury. Salk 365. 1 T. Rep. 145. 3 Bl. 395. of course the verdict cannot by any intendment supply it. Ex. If in Act. or covenant broken. performance of the condition precedent is not averred, the Dec. is not aided by verdict. for the fact of performance of the condition does not follow from the establishment of those facts that are alleged

.. And is not necessary to be proved to the jury to warrant their finding those facts that are alleged.— The proof of those facts that are alleged does not involve the proof of this.—

So if in an act. agt. the indorser of the bill Plff omits to state notice to Defr. of the dishonour of the bill. the verdict will not aid the defect. for the law will not raise an app. unless previous notice has been given in such case. Doug 655. 7 Co. 10. 2 Burrow. 900. 1 T. Rep. 645. 4 T. Rep 472. 7 T. Rep 125. 8 T. Rep 127. 8 2 Atk. 31. 574. 3 Salk. 12.

It is

Hm. to be observed that the court cannot presume the existence or proof of any distinct facts not alleged. because such presumed fact is necessary in point of law to support the verdict or recovery. For such presumption cannot be raised but upon the idea that the jury are constituted judges of the law. while the doctrine of arrest of judgt. goes on a supposition directly the reverse.— Indeed upon this supposition every defect would be cured by verdict. and it would be improper ever to make a question after verdict as to the sufficiency of the pleadings.

The things omitted must be necessarily involved in the fact found in order to cure the pleadings.

Thus in Asp. if Plff omits consideration. and obtains a verdict. it does not aid his Decl. for the consideration is not implied although in law a contract is not binding without it. and if the court will presume proof to have been made to the jury of such consideration from the verdict returned they

must also presume the jury to be such judges of the Law, never to find a contract without proof of consideration adequate. this cannot be presumed although the superior Ct in law said it could. 1 Vent. 27. 7 T Rep 351. (Kirb. 403 not law)

I observed

yesterday that a motion in arrest was generally had after verdict. It may also be made after default, but then a motion in arrest operates precisely like a gen.l demurrer nothing is cured: for nothing can be presumed to have been proved, there being no trial or verdict. and nothing is aided, except what would have been aided on gen.l demurrer. 1 Wils 171. 2 Burr. 900. 2 Str. 1271.

There are

cases in which judg.t will not be arrested for the greatest defects, and even tho. nothing is cured by the verdict. this happens when the first radical fault in the pleadings is on the side of the party who moves in arrest. For judg.t must be given on the whole record. Thus if the verdict is in favour of the party who upon the whole record appears intitled to judg.t he shall have it. however faulty on his part may be the particular pleadings on which the gen.l issue is taken.

Suppose the Dec.n to be radically defective or it in truth commits is not alleged. Defft puts in a frivolous plea in bar and Plff takes issue upon it and it is found for Defft Plff cannot arrest the judg.t for the first radical defect is on his side and a frivolous plea is sufficient answer to such Dec.n for there is no cause of act.n on the record.

So if Dec^n is good: Plea in bar and replication hath been & issue is taken on the replication & found for Plff he shall have judg^t and Defd cannot arrest it: for the rep^n is good enough for the plea in bar.

Bision cui bono: if the judg^t on such verdict were to be arrested the b^r must go back to the commencement of the record & the Plff would entirely succeed. Hob. 56. 199. Ld Ray 131. 1080. 1081. 860. 120. 133 9 Co. 110. 3 Lev. 224.

And in some case where judg^t in pursuance of the verdict is arrested. a judg^t may be entred up directly against the party in favour of whom the verdict is found.

For you will observe that the party prevailing in a motion does not necessarily have judg^t against the opposite party in the cause. as to that this is the

General Rule. That judg^t is to be rendred upon the whole record. that is in favour of that party who upon the whole record appears entitled to it notwithstanding the verdict. Hence if the party against whom the verdict is found appears upon the whole record entitled to judg^t he shall have it notwithstanding the verdict — ib. cautt.

Thus suppose the Dec^n wholly insufficient. the plea in bar either sufficient or insufficient and issue is taken on the plea & verdict found for Plff. still he shall not have judg^t but Defd^t may arrest and have judg^t entred up in his own favour.

Again suppose Dec^n good, plea in bar bad. replication

with good or bad and issue joined on it. verdict in favour of Defr. Pltff may arrest judgt and have judgt entered for himself. you will observe that I am not now speaking of immaterial issues. for the issue tendered in this case however closely watched and found could not make the defence good. here is a good defence and no answer to it. Hob. 56. 199. 200. 8 Co. 120. 133 1 Burr. 301. 306. 257-5 6 Bro. Par. Ca. 517.

It is necessary to distinguish between the last case and those in which a verdict is found on an immaterial issue for.

If the issue is taken on an immaterial point, so that the verdict does not decide the right. judgt may be arrested and a repleader awarded. Thus if the plea in bar be good and Pltff takes issue upon an immaterial part of it a repleader must be awarded. 2 Saund. 319. a. n. b 2 Mod 137. 6 Co. Ld. 434. 585. Salk. 569. 1 Saund 228. n. 1. Carth. 371 2d. 922

So when the Pltff leaving what is material takes issue upon what is immaterial. Defr may arrest judgt but cannot have judgt in his own favour. a repleader must be awarded. for a good ground of acth or defence is here disclosed. — In assp. agt & &c as much. he pleads that he made no such promise & issue is taken on it. it is immaterial and cannot decide the cause, but as we suppose the Declr to be good the court will award a repleader. stiling it a mistake or misprision of the pleader to prevent delay of justice permits a double issue. 3 Bl. 395. 6 Co Ld. 434. 1 Saund 228. a. note 1. 2 Vent. 190.

Again in an acth

against husband & wife for wrong committed by the wife while sole they plead not guilty and obtain verdict, a repleader is to be awarded. Law Ld. 5. Laws 176. 2 Bac. 27.

You perceive then that the ground of a repleader is that the Court cannot discover from the record for whom judgt. ought to be rendered, and here again note the diversity between verdict on an immaterial issue. & one on a Declr. &c which is wholly insufficient as containing no ground of defence or claim. for in the latter case there can be no repleader, and judgt. goes against him who makes the first bad plea.— But on the other hand if the Declr. plea &c is good & the opposite party takes issue upon an immaterial part of it. there must be a repleader, that the party may take issue on a material part for the verdict decides nothing.—

An issue is called immaterial generally, only in those cases where a material issue might have been taken, thus. suppose an obligation is made payable on or before a day certain. Defdt. pleads, to an actn. brot. on it. payt. before the day certain & Pltff joins issue precisely on the plea and it is found agt. Defdt. he may arrest judgt. and a repleader will be awarded. for a verdict that he did not pay it before does not involve the presumption on the day.— 2 Bac. 944. Stra. 994

This Example leads me to observe, that an issue may be material when found one way and immaterial when found the other. for if the verdict in this case had been in favour of Defdt. that is that he did pay before the day it would have been decisive.

In all those cases there in which the Court cannot discover in which way the judgt is to be given from the whole record a repleader is to be awarded. Co. Elij. 245. Co. Lit. 5. Salk 175. 6 Ray 258. Ld Ray 707. 1 Bur. 301. to 305. 3 Bl. 395. 2 Saund 319. n. Stra. 994.

A repleader is never to be awarded when no manner of joining issue could make the verdict decisive or material that is. it is never to be awarded when issue is joined on a point wholly unsubstantial. for that is a defect which would not be cured by any manner of joining the issue — 1 Bur. 301. 8 Co. 120. 133. b. 4 Bur. 2130. Stra. 394 Hob. 56. 199. 200.

These pleading distinctions goes thro the whole range of pleadings to a rejoinder —

When a repleader is awarded the pleadings begin de novo and at that stage at which the first deviation from the rules of pleading occured — Thus if Defr traverses an immaterial part of Declr & verdict is found on it a repleader is awarded on the part of the Defr 2 so if Plff takes issue on an immaterial part of a plea in bar Plff is ordered to plead de novo — Ray. 258. and imp. Comp. 510.

This is done that the parties may be at issue on a material point that the cause of action may be decided. —

It is said that if Declr is ill. a repleader is to be awarded & the Plff to plead de novo but this I do not consider a repleader you will remember is altogether a different thing from an amendment. — 3 Bl. 395. Salk 579. 173. 216 1 Bur. 301. 306. 2 Saund. 319. b

And it seems a repleader is never awarded for the immateriality of the issue, in favour of him who tenders the immaterial issue — Thus if Plff traverses an immaterial part of the Defts plea in bar and verdict on it is agst him. he cannot have a repleader. 1 Saund 308. 2 Saund. 319. Doug. 308. Comp 506. 1 Arn Bl. 644. Tidd. 824.

An issue may be immaterial if found one way and material if found the other as I had occasion to observe yesterday. as in an actn of debt on bond payable on or before a day certain. Defts pleads payt before the day. & verdict is found agst him. here the issue was immaterial. and it does not appear from the verdict that he has broken his contract the cause is not decided. there must be a repleader — but if the verdict had been in Defts favour. as entailing a good & lawful defence as that he did pay before the day. the issue becomes material and no repleader can be awarded. 2 Burr. 944. 3 Wils 173. Com. Rep. 148 4 Bac. 66.

A repleader is never awarded after demurrer. it is only after an issue in fact that it is ever done. an issue in fact may be immaterial. an issue in law can never be, for it extends thro the whole record comprising all that is demurred to. 5 Co. 52 Cro 42. Cotteto. 148. 6 Mod. 102 Contra 3 Lev. 400. 20. —

If a repleader is granted when it ought to have been denied or denied when it ought to have been granted it is error. — Salk 579. 6 Mod. 2. 1 Day 27. 152

Then can be no re-

pleader after default or discontinuance. for after default
Plff does not wish it & Defts is out of court as is also the
party discontinuing. —

In neither of these cases can there be an
issue upon which the judgt of Crt is required. Com. 323. Salk
579. 6 Mod. 3.

At CL when nothing in general was aided by
verdict. repleader was sometimes awarded before trial, but since
the statute of jeofails there can be no repleader before verdict
for the defect may be cured by verdict & the court will not
prejudge the cause. But if the court can plainly discover
that the defect must ruin the issue a repleader may at
discretion be awarded. 1 Bac. 90. 103. 3 Keb. 664. 6 Mod. 2.
1 Lev. 32 Carth. 371 Salk 579. 4 Leon. 19.

I have thus far considered ar-
rest & repleader in relation to defects in the pleadings.
but Judgt is sometimes arrested for defects in the verdict.
as if the jury find only part of the issue omitting a ma
terial part. judgt is to be arrested and a venire de novo
awarded. it is the duty of the jury to find the issue one
way or the other. but in this case they have done neither,
there is no room in such case for a repleader. the defect
is only in the verdict & not in the pleadings. 5 Bac. 296
Cro. Eliz 103. 3 Leon. 82. Ld Ray 1521. Stra 844. 1089.
1 Inst. 227.

And if in a special verdict the jury find only the
evidence of a material fact, and not the fact itself either
way judgt must be arrested and a venire de novo awarded.

If the Jury should give greater damages than Plff demands. Plff may release the surplus or court may inform ℔ for the amount demanded. but judg℔ for the whole verdict would be erroneous. 10 Co 115. 6 Bac. 192. 272. 2 ib. 223 Sty. 364. 2 Buls. 280. 2 T R. 113. 1 H. Bl. 643. 4 Bac. 25.

If Plff demand more than by his own showing he is entitled to recover, and the jury give more, he cannot have judg℔ without releasing the surplus. as in an act℔ on bond. 1 Roll. 455. Allyn. 29. 4 Bac. 26. Esp. d. 304. 2 T. Rep. 113.

Trover if in Trover the Jury find. the property was the Plffs came into Defts possession & he refused to return it, on demand, without finding the conversion. for all this only constitutes evidence of conversion and the court cannot infer any matter of fact from mere evidence. 2 Bur. 1243. 1 East 111. Esp. D. 590. 1 Salk. 227.

The rule does not require the verdict to be in the precise words of the issue. if the substance of the issue is found either way it is sufficient 1 Salk. 227. 1 Vent. 27. 12 Mod. 5.

A verdict which finds the whole issue either way is not vitiated by finding more. this excess is mere surplusage. utile per inutile non vitiatur. 5 Bac. 297. 299. 2 Roll 714 6 Co 57 Cro El. 407.

If the jury after finding a fact specially make a conclusion of their own from it. the Court is not bound by that conclusion and cannot regard it. Thus if on a question of usury the jury find some particular facts & then conclude "& thereby D.S. did usury in fact. notwithstanding this the court may determine those very facts do not constitute usury — for the court are only to notice the facts found and draw their own conclusions 5 Bac. 286. 11 Co. 10. Hob. 53. 56. Dyer 362.

If in a civil act. there are two counts one good the other substantially ill & the jury find a gen. verdict with entire damages judg. must be arrested and a venire de novo awarded for the court cannot determine from the verdict for which count the damages or how much for each &c. 10 Co. 130

Bull. N. P. 8. 2 Wils. 377. 1 T. Rep 508. 532. Doug. 362. 2 Hen Bl. 318. 1 B & P. 329. This rule does not apply in C.

although in this case the Def. if good on demurrer. yet after verdict such a verdict. judg. will be arrested.

This is not inconsistent with a former rule. that a motion in arrest must be founded on something that would have been bad on gen. demurrer. for this is no defect in the pleadings. but in the verdict. 3 Bac 568. 1 Mod 261

The case lately

learned with some surprize that our court will not in such case grant an arrest. but will give Plff the damages assessed. this is certainly illegal for it is constituting the jury judges of the law.

But if several damages are assessed on the different counts. Plff may release as assessed on the bad count and take judg. according to the verdict on the good.

But if there be two such counts in a dec. and no evidence be given on the bad count but the verdict general. the verdict may be amended in such case by the Court from the judges notes, so that judg. will not be arrested. but the verdict so corrected as to apply to the good count only for it is not to be presumed that the jury would give damages on a count without some evidence to support it. Stra. 513. 515. 1 Lev. 134. Doug. 362.

When judg. is arrested in this or any the

When the affair is in the pleadings then qu. is no venire de novo awarded.

The only diff. is that the returning is entered upon the record before the motion is made. here the examⁿ is had upon trial of the motion. the judge is informed of the fact as being the then examining evidence. But in this case our practice is precisely followed in Wyatt 1 Hen 79. 5 Bac. 291.

defect in the verdict. then is a venire de novo awarded. but no
where the fault being only in the verdict and the venire
is awarded that the same jurors may be tried again and
properly returned Doug. 362. 8 T. Rep. 564.

In criminal prosecutions if one count is good and the other bad & a gen.
verdict of guilty is found. Judg.t is never arrested. the jury
never also fine nor inflict a punishment and as the Court
are supposed to know a good count from a bad one. they are
to address the verdict only to good ones a bad count in this case
being mere surplusage — 2 Burr. 985. Doug. 703. 2 Hawk
627. Salk 384. L Ray. 886.

I nearly observed that a judg.t is
arrested only for intrinsic cause at C.L. but from the practice
of Ben. judg.t may be arrested for causes either extrinsic
or intrinsic, and although this might surprise a pro-
fessor of the C.L. there is no impropriety in it. thus
for misconduct or corruption of the jury or either party
attempting to bribe or tampering with them. — in Ben.
this is averred before the court where the motion for arrest is
made and witnesses are examined as both sides viva voce —
In Eng. the proof of these facts is made before the judges
at N.P. by affidavits returned on the postea and sent up
to the Court in Bank when the motion in arrest is
tried. so that the court at Westminster do not hear
evidence but only hear the certificate of the judges at
N.P. Rule 13. 133. 184. 5 Bac. 291. Stra. 642. 1 Vent
125. 1 Inst. 227. 5 Bac. 288. 292. Bunbury

If one of the jury is related in the 1st deg. or so related to the prevailing party or his bail as to constitute a ground for a principal challenge judg. if time arrested. Kirb. 184 279.

That one of the jurors had been an arbitrator or atty. or had given an opinion in the same cause is a sufficient ground of arrest for all this goes to his impartiality. Kirb 166.

And it is a gen. rule that any incompetency which goes to the impartiality of a juror and would have been good ground for a principal challenge is a good ground for motion in arrest of judg. Kirb 13. 133. 184.

But an incompetency which raises no presumption of partiality is no ground of arrest. now near relationship goes to the impartiality but want of freehold & must have inquiry to be for freeholders, is no ground of arrest — Kirb 184. but in a cap. case it is good ground of arrest 1 Con. Rep

And although the incompetency goes to the impartiality yet if the party moving in arrest for this cause knew of the fact in season to have made a challenge, & did not challenge he is presumed to have waived all exception. for it would give him an undue advantage to take his chance with two juries. Kirb 166. 2 Swift 232

Hence if one of the jury who tries the issue had been a juror before in the same cause in an inferior court. yet the party cannot for this cause arrest the judg. although it is good ground of challenge, for this is on the record and of course is presumed to be known to both

parties. and if it is not not the court will not favour this negligence. 2 Swift 2 32. Kirb 160.

But although in law we must judge for intrinsic cause yet the court cannot go into the evidence or review the testimony upon which the verdict is founded and they decide upon the heads of the jury. Kirb 61. 87. 142. 273. 277.

When judgt is arrested on account of the misbehaviour of the jurors or of the parties however then there is no repleader, but a venire de novo is awarded since Mr Swift is mistaken on this point 2 Swift 264. 1 Root 573.

I have observed to you the difference between the Eng. practice & ours in setting aside verdicts for this cause for the Eng practice see 5 Bac. 288. 291. 292. Bunbury 31.

There are two cases in the Eng. books which were decided precisely on our model or perhaps rather more for the hearing was by affidavits — 5 Bac. 291. 250. 1 Freeman 79. Our courts examine witnesses viva voce on both sides —

In this case however when the complaint is founded on any intrinsic fact, a motion for a new trial is a convenient remedy & the most usual one in Eng. 5 Bac. 250.

When judgment is arrested for a defect in the pleadings no costs are awarded on either side, for the party might have demurred and thus have saved the expence and delay of a trial. Salk 579. 2 Vent 196. 1 T. Rep. 267 Comyn 207. Sho 617. Kirb 89. 1 Root 69. 70. 572. Ch. Pl. 638.

Rule is the same. when the party moving in arrest, fails, brings a writ of error in which he prevails. he shall have no costs. Ch. Pl. 638. 9

And regularly Plff in error recovers no cost in any case, for he might have demurred and then brot his writ of error.

But being in the nature of a penalty if judgt is in favour of the original defts in the Court below & Plff in error prevails. he shall not have costs for Defts is in no fault. — 1 Chitty Pl. 638. 9.

This rule does not apply to arrests of Judgt for intrinsic cause in Com. a venire de novo is awarded and in the second trial the whole costs follow the final writ. for the party could not have taken an earlier advantage. 1 Roll Ab. 572.

In Eng. motions for arrest are made within the four first days of the term next succeeding the trial. 3 Bl. 395 If the last of those days happens to be sunday. the motion may be entered on monday — Form 3 Bl. Appx. No 2. p. 11

In Com. the motion is made when the verdict is recorded. must be reduced to writing and delivered to the adverse party or to the Clk within the next succeeding 24 hours — I believe those that the time is now extended to 48 hours — Wells 235. 1 Roll 572. —

Accord to former practice in Com. when an issue was found for the court there could be no arrest of judgt for defect in pleadings.

Bills of Exceptions & Writs of error

A bill of exceptions is a statement of certain facts and of some interlocutory judgt. founded upon them. which one of the parties claims to be erroneous. annexed to the record for the purpose of founding a writ of error. —

This statement consists of facts not originally appearing upon the face of the record. and is called a bill of exceptions because it contains exceptions to the interlocutory judgt. complained of. 3 Bl. 372. 1 Bac. 325. 4 Co. 13 b.

This mode of founding error was not known at C. L. but was introduced by the Stat. West. 2. 13 Edw. 1st. ib. auth. & Bull. N.P. 315. 1 Vin. Ab. 324.

In Com. law we have no statute on this subject. but our courts have adopted the Eng. stat. as it is one of those old stat. which are considered as forming part of our C. L. Rint 168

A bill of exceptions cannot be filed except in those courts from whose judgt a writ of error lies. for the sole object of the bill is to found a writ of error. and so a bill cannot be filed in those courts which are not courts of record. Bull. et. P. 316 1 Bac. 327.

And this bill may be filed in all courts whose judgments are liable to be reversed in error. thus in Com. Pl. justices. county & superior courts. In Eng. the Com. Pl. Exchq. & Kings bench. as to the latter it has been doubted. but I conceive that according to principle a bill of exceptions may as well be filed in that court as in the Com. Pl. 1 Bac. 326. Stra. 356. 2 Lev. 237. 2 Show. 147. 287. Bull

1. P. 316. Vide 289.

As to the cases of a bill of exceptions.-

When a party offering to demur to evidence is overruled improperly he may take advantage of this error by a bill of exceptions. 1 Bac. 326. 9 Co. 13b. Cro Eliz. 249. 341.

If a misdirection in point of law is given by the court to the jury it is good ground for a bill of exceptions. this however is more commonly remedied by a motion for a new trial. 2 Mer. Bl. 288. 1 Bro & Pul. 564, 5. 2 Mer Rep. 1 Bac. 134

If evidence which is objected by one party is admitted by the court. the unsuccessful party may file a bill of exceptions, the more convenient & now the more usual mode in such case is. to move for a new trial. 2 Lev. 237. Bull N P. 316. 1 Bac. 326. Vide 168

But if a judge admits evidence offered a bill of exceptions cannot be filed, because he did not direct the jury how to find on that evidence. even if the evidence were a record which is the strongest case. & he did not tell the jury that it was conclusive. indeed if he did not notice it at all.- But if he misdirects the jury a bill of exceptions will lie. Ray 205. Bull. N. P. 316. 1 Bac. 326

If oyer is refused when it ought to be granted. or a deed which ought to have been served. a bill of exceptions may be taken.- this is the way that I find the rule laid down. but the latter part of it appear to me to be incorrect as was observed in the title of Pleas & Pleadings (which see). 1 Bac. 325. Dyer 231. Ray. 486. 2 Inst. 427.

But in order to entitle yourself to relating to mere matter of practice a bill of exceptions cannot be allowed, for since there is no principle of law involved there can be no error. this error is not predicable of any judgment on a motion for continuance, so if a party thinks he is compelled to plead sooner than the rules require, or if the court refuse to order bonds to be retired for the security of costs — in these cases there is no principle of law violated there can be none, it is a matter altogether discretionary with the court. Same authr.

And as a general rule we may say that when a decision of any kind is made by a court which is entirely discretionary, a bill of exceptions cannot be allowed for error is not predicable of such judgment.

And for the same reason a bill does not lie for not granting a new trial or if the court prescribe terms to the grant the party thereby — for this is an application to the discretion of the court. Bull N. P. 316. Tidd 41 1 Bac. 327. 1 Roll 290

I conclude however that if the court should grant a new trial in a case in which under any circumstances, a new trial from the very nature of it cannot be granted it would be error. As if a new trial should be granted in a criminal case after Deft. had been acquitted so if a justice of peace should grant a new trial, it would be directly contrary to Law.

So that you, in view the general rule above is to be understood with this qualification, that the determination be entirely discretionary. that is such that

the rule of law would justify them in determining either way.

There are some cases in which no new trial can be granted on either side, as in Treason & Felony — not in favour of the prisoner and much up of the crown — This you will observe is the C. L. rule.

The reason why a man when acquitted is a good one that the benignity of the law will not suffer a man to be tryed twice for the same offence — the reason given for the other part of the rule, that the judges are of the counsel for the prisoner and will see justice done him Mr Gould thinks a strange one — for it goes on the ground that judges cannot be mistaken & that they can be is the very ground of a bill of exception.

The true reason is that the statute which introduced bills of exception does not reach such cases so that the court have no authority to grant a new trial — 1 Sid. 84 1 Lev. 68. 1 Vent. 324. Ray, 2. 86. Keyling 15. 1 McNally 325.

An other reason is that at C. L. a man cannot be tried twice.

But new trials may now be granted by our courts even in capital cases, and this has been the practice of the circuit courts of the U.S. they are granted in favour of the prisoner. this I take to be the law & if so I see no reason why a bill of exceptions might not be filed in his favour that they cannot be filed against him I shall observe more particularly when speaking of new trials.

If the bill is not confined to grounds of exception or points it ought not to be certified & if it is the court above will quash it. & this on motion to quash. In fact it is abated by Illinois Act this Court is not the next proper court

Whether bills are allowed on indictments for misdemeanors is a question not well settled. they have been always allowed in cases of mere trespass and I see not why the same reason should not be extended to all cases not capital. 1 Bac 325. 2 Hawk 328. 1 Lev. 5. 1 Vent 366. Bull N.P. 316. 1 Lev. 68. Vellings 15. 1 McNally 326. 7. Kirby 269. [illegible] 286

From the rule in cases of trespass I rather conclude that bills of exception are allowed in misdemeanors for the prisoner but not against him.

When a bill is filed and allowed the court will not suffer the party to make the same exception the ground of a motion in arrest. — this however has been questioned 1 Bac. 327 2 Lev. 237 1 Vent. 366.

In our practice it would be absurd for the motion in arrest would refer to the court the same question of law which they already determined. —

I mean there could be no benefit to the party to move for an arrest for the remedy by bill would be equally effectual. Bull. N.P. 316. 317. 1 Vent 366. 2 Lev. 237. 1 Bac. 327.

As the object of a bill of exception is to draw before a higher court judg[t] in some collateral point, it cannot regularly embrace the whole merits of the case. Hence a bill containing a gen. Statement of all the facts evidence & arguments is inadmissible although this has been practised sometimes — In some cases

in Con. the court above have abated the writ of error. Comyn 161. 1 Bl. Rep 555. Bull N.P. 316. 8 T. Rep 549. 1 Morg. Ess. 466. 2 Swift 276

In Eng. a bill is authenticated by the signature of the judge, judges or one of them who presided at the trial, and they appear in the court above and acknowledge their seals this is the manner of certifying the bills to the Court above 1 Bl. & P. 32. Comyn. 161. 1 Bac. 325.6

Indeed in our practice the bill becomes part of the original record. is annexed to and exemplified with the rest of the record by the proper officer the C.R. it must contain a statement of the interlocutory judgments and the facts on which it was founded — if truly stated by the counsel the Court are bound to certify it. it is their duty however to examine and see that it contains a correct representation. Powr. 316. 1 Bac. 326

If the judge or judges refuse to certify it a writ lies by the Stat of Wst. 2 commanding them to do it. this of course is in the nature of a mandamus. 2 Lev. 237. Bull N.P. 315. 1 Bac. 326.

In our practice the bill is certified by the signature of the Chief Justice or in his absence, of the presiding judge of the court.

Bills of exceptions are not taken in our Sup^r court now. for the judges of that court resolved not to certify them. I know not how a court of C.L. could make such a resolution. they however supposed themselves authorized to do it by the Stat. which enables them to make rules of prac-

For a bill being a matter strictly juris. judgt. must be reversed for the slightest error but a motion for a new trial will not be allowed in gent. if substantial justice has been done. This motion however will not carry the matter to a higher court.

tion. I do not think that Statute reached this far.

So that now the remedy in such case is a motion for a new trial which is now the universal rule. and I think the best of the two methods.

In Eng. the bill itself & the substance of it reduced to writing must be tendered to the judge at the trial 1 Salk 288. Hutt 301. Bull N.P. 315.

In Con. the party who proposes to except must give notice of his intention before the cause is committed to the court or jury and file his bill within 24 hours after the verdict is accepted and recorded when the trial is by jury & within the same space of time after judg.t when the trial is by the court. 1 Root 569. 570. 2 Swift 276. & always before the rising of the court. in this computation sundays are always excluded.

In Conn.t it is necessary to state not only the intermediate judg.t & the facts on which it is founded, but the grounds of objection thereto & arguments taken or used at the trial.

A bill when allowed is no supersedeas of the judg.t but it enables the party to obtain a supersedeas by a writ of error. 12 Mod. 609. 1 Bac. 327.

For the form of a bill of Exceptions see Bull. N.P. 317.

Our form is to begin with the usual caption. Litchf.d ss. Sup.r Ct. 6.th term of Aug.t 1801. Bill of exceptions &c by P. v. D.t

Trespass. Plea gen. issue &c. the party states at the trial of the cause the Plff offered such a writing to prove such a fact. Defr objected to the writing. the court would not admit him and now the Plff moves to reverse said judgt & prays the court to certify the bill.

The bill thus becoming part of the record is the foundation of a writ of error. It is not so in Eng. for it is then no part of the record of the court below. 1 Bro. Pal. 52.

Writs of error. a writ of error at C. L. is a commission to the judges of a higher court to examine the record of the court below & to affirm or reverse it according to law. 3 Bl. 407. 2 Bac. 187. Yelv. 209.

The writ in Eng. does not summon the party to appear. it not being an original writ to enforce said appearance, he is summoned afterwards by a scire facias to appear ad audiendum errores. 2 Bac. 207. 216. for the form see 3 Bl. appendix.

It lies, it is an original writ summoning the party to appear to hear the record. the errors &c.

A writ of error founded upon a mistake in the legal opinion of the court below is brot for the reversal of such judgt only, as are entered on some point of law appearing on the face of the record: and are not brot to rectify mistakes or errors in the determination of facts or the weighing of evidence. 3 Bl. 407. 1 Rol. 746. Cro. Eliz. 233. Dyer 35. 1 Leon. 233.

By the term

* (1) the county of B.R. the Superior Ct. in Convt.

writ of error without more is regularly meant one of the description already given viz on founded on some apparent error on the face of the record. 2 Bac. 187. 3 Bl. 407.

If on the writ of error Plff can recover any beneficial interest or be restored to any thing in the nature of debt or damages &c. or to any thing real as land it is considered in the nature of an action & of course a release of all actions will bar the writ. But if the object of the writ is to recover only a judgt of nonsuit and the costs incurred in the court below it is not considered as an action & so a release will not bar it. 1 Inst. 288. b. 8 Co. 152. 1 Roll 788. 2 Roll 405 2 Bac. 225. 187.

There is however a species of writ of error founded on matter of fact extrinsic or dehors & does not appear on the face of the record. a writ of this kind lies to such court of errors only as can try matter of fact, & not to such as cannot. as the Exchequer Chamber for that court has no jury Cro Eliz. 5. 1 Vent 207. 2 Lev 38 2 Bac. 215

Such a writ of error may also be usually brought in the court in which the original judgt was rendered & then it is called a writ coram nobis or vobis. This is brought not strictly for an error of the court, this error consisting in some extrinsic fact. as if a suit should be brought & judgt recovered against a feme covert the Court not knowing of the coverture the baron & feme may join in a writ of error to reverse the judgt & it may be brought before the court that rendered judgt at first or before a higher court.

So if judgt is reversed

against an infant the same remedy is allowed and is good whether the infant was Plff or Defr. – observe however that the Ct when they have information will appoint a guardian ad litem Carth 122. 179. 3 Bac. 151. Salk 400. 1 Vent 207 Cro Jac. 105. 2 Bac 198. 217. 228. 4 Bac 39.

If a Plff or Defr dies pendente lite & judgt be rendered as if he were alive the court not knowing of his death. his representatives may bring a writ of error of this kind coram nobis and have the judgt reversed. 4 Bac. 143. Ray. 59. Carth 338. 9.

So also it may be assigned in the writ that the judge who gave the judgt was interested in the cause, for this is an extrinsic ground of error. Stra. 639.

Again if one sues as Ex or Admr of another who is still alive the latter may bring a writ of error & reverse the judgt either before a higher court or coram nobis. 3 T. Rep 129 1 Roll. 744.

But a writ of error will not lie from the judgt of any court not a court of record. for a writ of error is founded on the record. thus it will not lie from an Eng. County Ct those not being courts of record. 1 Inst. 288. b 2 Bac. 194.

Nor does a writ of error lie to reverse a decree of the court of Chancery – it not being a court of record. altho it is of as high and in some cases of higher authority than those courts which are courts of record & from which writs of error lie. The decisions of that court are reviewed by an

a writ of error may be brot. upon judgt. if nonsuit or by default as well as if issued upon pleadings or verdict. Thus the declr. may be substantially defective. 4 Dy. 32a. 1 Roll. Abr. 235. 1 Ken. Bl. 432. 1 Roll. 744.

appeal to the house of Lords. 1 Roll 744. Bull. N. P. 235.

For how by statute the decree of a court of Chancery is moved in the same manner as the judgt of a court of C. L. & so are the decisions of the common Pleas & other courts. by virtue of the same statute, indeed the two last mentioned are strictly speaking courts of record. 4 Bac. 162

There are two species of error on which writs of error may be found.

1st For matter of law apparent on the face of the record.

2d For matter of fact not then appearing.

If matter of law & fact are both assigned in one writ it is duplicity for those points require different trials; one by the court. the other by the jury. 2 Bac 217. 1 Roll 761. 1 Sid 147. Ray 231. 1 Vent. 252 Yelv. 58. Ray 59. Com Dig. Pl. 3. B. 15.

But altho. errors in law and fact are blended still if the Defr. plead in nullo est erratum or nothing erroneous he loses the advantage to be taken of the duplicity & waives all exceptions. for a plea of this kind generally confesses the errors in fact & then there is room but one trial. & perhaps not that for the confession on any hinders the necessity of it.

The Defr. if he would take advantage of this double assignment of errors must demur. Sault 338. 1 Lev. 6. 1 Vent 252. Salk 268. 6 Mod 113. 216.

A general Demr. will however reach this mistake although it is called

"as if the assignment contradicted the record or was of matter not assignable for error

duplicity. the reason is that duplicity in a writ of error is not within the Stat of 27 Eliz. which requires special demurrer duplicity. so that it remains as at C. L. 1 Bac. 95. Carth 338. 2. 2 Bac. 218.

So the assignment of more than one error in fact amounts to duplicity. as if the unsuccessful party should assign infancy & coverture both at once for either of these is sufficient to arrest judg.t & sure there must be two issues. Fitz Stat. Barr. 20.

But the assignment of any number of errors in law is not duplicity. any more that the specification of several defects in a special demurrer. duplicity is not predicable of more in the of law for there can be but one issue. & that reaches thro the whole record. but for every error in fact assd there must be a distinct issue Com. Dig. Pl. 3. B. 15

If an error in fact is well assigned the Defr in error cannot prevail unless he traverse it. for a plea of no error confesses it. If however it is not well assd such a plea does not confess it. Yelv. 57. 1 Sid. 93. Ray 59. 231. 1 Roll 758. 2 Bac. 218

It has been determined by our Sup.r courts that assigning 2 errors in fact not assignable with sufficient errors in law does not vitiate the writ for Rules 27. 32. duplicity.

In another instance where a plea in abatement of a writ of error was founded on misjoinder of facts

I doubt the propriety of that determination, for Defts in error should have an opportunity to defeat the writ when it is thus defective.

It is a gen. rule that Defts in writ. of action cannot allege for error that which he might have taken advantage of on the writ. of action by plea in abt. for matter of abt. it is replevy assigned by plea Co. Litt. 127. b. 2 Bl. R. 66 2 W. Bl. 267 299

and law in the same writ. But court ordered the error in fact assigned to be stricken out. & moved the judgt in law. 1 Roll 262. 2 Swift 277.

I observed that when an error in fact is ill assigned the plea of nothing errorneous does not confess it. since if there is an assignt of something as erroneous, which contradicts the record it is not confessed by such plea. for it is an ill assignment. Thus if an assignment is made that the court did not sit on the day of the date of the judgt when the record shows that it did. this assignment is ill as contradicting the record & is not confessed by such plea.

So an averment that the judge died before the date of the judgt is for the same reason inadmissible.

Prarty may say that what is said to be the record is a forgery that you perceive is a different thing.

So to aver that the Plff did not appear when the record says he did is ill. In none of this case does the plea above protestation & confess the averment. 1 Roll 757. 2 Bac. 218. 219. Cro L. 12. Cro L. 568. Hob. 204. Cro Eliz 469. Ray 231. Salk. 262.

When an error in fact is assigned the proper conclusion is with an averification. this has been disputed but this seems to me to be a manifest absurdity in concluding to the country. Thus if infancy is assigned. Plff in error

cannot conclude with to of this he puts himself upon the country for this is no issue no one has said he was not an infant he should have concluded with a verification & then the issue would have been formed regularly. Here he alleges new matter as Defts does in a spec. plea in bar & he must conclude in the same way.

(By an Eng Stat. a spec. plea of bastardy concludes to the country but this is a solitary instance) Salk 365 1 Bac. 412. Contra. Yelv. 58. 2 Bac. 218.

It is a gent. rule that for an error in fact a coram vobis may be brot as in the case above mentioned. and it is the most usual way. altho such error may be carried to a higher Ct 1 Roll 747. 4 Bac. 39. Salk 400. 2 Lev. 38. Cro Jac 5. 1 Vent 207

But on the other hand. for an error in law appearing on the face of the record a coram nobis does not gent or regularly lie. indeed there would be a manifest impropriety in it. as its object would be to have the judges reverse their own judgt More 186. 1 Sid 208. 1 Roll 749 1 Lev 149. 2 Bac. 215.

But there are cases. in which an error tho appearing on the record is not the fault or mistake of the court. which an exception for the reasoning of the rule does not apply to them. Thus suppose a mistake of the Clk in entering judgt contrary or different from the order of the court. here a writ coram nobis may be brot for this same court is the most proper of all Courts

Of the time of bringing the writ.—

to come at the error.

So it is a general rule that tho' an error in law appear upon the record by an officer of the court note on the bench a writ of this kind will lie. 1 Roll. 746 Fitz. 21. Errors of this sort not being errors of the court. the court can correct. —

So if there is an error in the process which vitiates the judgt a writ of error coram vobis will lie. for this is not a mistake of him of the court. the original judgt is given on the pleadings only of which the process is not a part. Fitz. 21. Pop. 181. 1 Roll. 746. 2 Bac. 215.

It was formerly a rule that a writ of error tho' found on an interlocutory judgt could not be brought tile final judgt entered. for the party might finally succeed and then there would be no need of it. 1 Roll. 749.

But this rule is now somewhat obsolete in the Eng. practice & it seems that a writ of error will be good although sued or tested upon the final judgt provided it be made returnable at a day subsequent. no harm can ensue from this practice and it removes technical objections which are now in use 1 Vin. 255. 3 Keb. 308. Latch 133. 1 Sid 104. 466. 12 Rep 280. Stra. 807. Com. Dig. tit. D. 2. L.

In Con. it seems that the old rule still prevails 1 Root 181. 290

— Our supr court have decided that an agreement of the parties to dispense with final judgt shall not supersede

the rule now bind the court. and as I think very correctly for no agreement ought to for the court to dispense with their forms & final judg.t ought first to be rendered.

It is a genral rule of C.L that when a judg.t is joint against several persons. they must all join in one writ of error to reverse it. and one or any number less than the whole cannot bring it.

And if one of the parties should refuse to assist or join in it. he must still be named & there must be a summons & severance Coutt 7.8. 367. 1 Roll 744. 3 Mod. 134. 2 Bac. 1989. This rule is founded in common convenience & expediency. for it would be vexation to allow each to bring a separate writ.

When however the parts of the judg.t are separate in relation to the subject matter it may be reversed in part and affirmed as to the residue. thus if damages and costs are allowed when only damages ought to be given, the judg.t may be reversed as to the costs and affirmed as to the damages. 1 Str. 189. 2 Str. 808. 2 Burr. 2022. Rib. 116.

It has also been determined in our courts and very properly — that when the judg.t is severable by any certain rule, it may be reversed in part and affirmed as to the residue. — Thus are certain Statutes for example in Eng. & Irel. which provide that in certain circumstances the Plff cannot recover more costs than damages, in these cases the court may reverse the judg.t as to that part which is illegal, that is the ex-

10. Ignore Hood to the rule. I do not perceive at law. The
rule or might have been the most favorable or greatest de-
fendant. —

exp of the costs above the damages and affirm as to the residue
there are cases in the books from which a rule contrary to
this might be inferred as the Eng. practice but I know
of none exactly in point. In our courts this point has
been determined 1 Root 138.

But our courts have gone further and determined that a judg.r may be reversed as to part
of the Defts and affirmed as to the rest. as if in an act.n
for assr & battery one or more of the Defts were minors and
sued without guardian or not found and judg.t entered
against the whole. it may be reversed as to the minors
by writ of error & affirmed as to the others. this rule is a
very convenient & good one although it is directly op-
posed to Eng. practice. Kirb. 114. 1 Roll. 776. Cro. J.r 289
2 Bac. Ab. 198. 9. 228.

No person can bring a writ of error
except one who is party or privy to the original judg.t as
an heir in real actions because he is representative. so in per-
sonal actions. the Ex.r or Administrator may bring the writ.
so may the remainder man or reversioner on the death of
the particular tenant. for privity of estate. 1 Roll 748. 755.
Dyer 90. 1 Sid 317. Fitz 107. 1 Lev 261.

The same rule holds as
to Defts in error. no writ of error can be brought against one
who is not privy or a party to the original suit or judg.t for
the rule is precisely reciprocal

It is also a general rule that
no person at the privy or a party to the original judg.t can bring

and if pltf is nonsuited as to one & for another, the latter cannot join in a writ of error. the former rule presupposes pltf to have been nonsuited.

a writ of error to reverse a judgt unless the error was a disadvantage or damage to him. Thus if an action of trespass were brot against two one of whom was acquitted he cannot bring a writ of error to reverse the judgt it must be brought by the one against whom judgt was rendred. and this is not at all inconsistent with the former rule above mentioned. for you will observe that the judgt in this case was not joint. 5 Co. 39. Hob. 70 8 Co. 59. 1 Lev. 210 Stra. 892. Comp. 425.

But there is an exception even to this rule when the error is the fault of the court & also after the reversal, that is, the nation of the judgt that ought to be rendred — in cases of this sort the party in whose favour the judgt is may bring a writ of error to reverse it. Thus the judgt being a misericordia the amercement is omitted when it ought to be inserted, either party may bring the writ. (Since when costs are omitted and damages only given. (no however it is damages) how it may be asked why the party who is not injured can bring a writ to reverse the reason is that the judgt is incomplete & neither party concluded by it. 8 Co. 59. Cro. Jr. 211. 1 Roll. 759.

It is a rule in Law. when on a reversal the Plff would enter in the court above for further trial he must do it in the same term as that in which judgt is rendred. 1 Roll 88.

And the writ must be brot to the court in the county in which the original act was tried. In Eng. writs of error are brot in one county only viz. Middlesex. 1 Roll 259.

It has been decided in Connecticut, that two judgts. of a like kind, between the same parties & depending on the same principle, as on two notes, may be joined in one writ of error — this rule I should think would in some cases be very inconvenient. Kirby 160.

By our practice the writ is signed by a judge of the court to which it is returnable. 2 Swift 277.

Also in our practice when an exemplified copy is said or claimed to be different from the original, the record is ordered to be brought up, for one copy of it is of as high authority as can other & if the two copies differed no judgt. could be rendered without the original. In Eng. the original itself is at first carried up. 1 Rast 88.

How far is a writ of error a supersedeas? — It was once said that by shewing a writ of error to the Deft. in error it operated as a supersedeas during four days. that being the time prescribed for the allowance of a writ by the C.J. of error. & if Deft. in error took out Exn. within this time he was in contempt. — 1 Vent. 255 1 Roll 492. 2 Kirby 129.

But now a writ of error is no supersedeas until it is actually allowed & then the proper requisites being complied with it becomes a supersedeas. 1 T. Rep. 280. 1 B & P. 478. Barns notes 376 2 Bac. 210

By a supersedeas is meant a suspension of the right of the par-

to prevailing below to take out execution, or to proceed upon it if already taken out.

Four days is the time prescribed in Eng in which the Plff in error is to put in bail and the allowance of the writ operates as a supersedeas during that time & if at the end of 4 days bail is put in the supersedeas continues. if not it ceases, & Ex may be taken out and proceedings had. 1 T. Rep 280.

The bail in this case consists of a bond given with two sureties. in double the amount of the judg. this is prescribed by Stat 3 Jac. 1 & a Stat of Ch. 2d. 4 Bac. 672. 3. 1 Bac. 212.

This bail is intended as a security to the Deft in error for the satisfaction of the original judg. in the court below in the event of its being affirmed.

There is no supersedeas until bail is entered for were it not so, the Ex might through a change of circumstances become of no use to the Deft in error.—

In Cont. if sufficient bail is put in the writ of error becomes a supersedeas of the execution from the time of service of the writ. for a writ of error is conserved as an original writ, & if the Plff proceeds with the Ex he does it at his peril. for he is both a trespasser & guilty of contempt. But it is no supersedeas until served for this is the only regular notice to the Deft in error. Phelps & Landon. 2d Dey.

This bond is made to secure the Defr in error all costs interest damages & costs to which he may be entitled on the affirmance of the judgt 1 Wils. 98.

Extrs and admins

when Plffs in error on judgt die bonis testatoris, may have a writ of error without bond in Eng. because they are not within the stat of 3d Jac. 1. Cro Chl. 350. 4 Bac. 672. 3. Cro. J. 350.

In our practice, when the execution is already in the hands of an officer the writ becomes a supersedeas of that Exn by a copy of the writ of error being delivered to him. see the case in 2d Day Laidon & Phelps. —

There was formerly no rule fixed in Court as to the time of pleading in abatement to a writ of error — it is however now limited to the same time as in the Supr Ct viz the second opening of the Ct on the second day of the term — that the time was before indefinite see Salk 289

If a writ of error abates or is discontinued by the default of the Plff in error. a second writ is no supersedeas. for if it were the unsuccessful party might put off the Exn for any lengths of time till the Stat of limitations should run. — And if the Plff in error is nonsuited he cannot have a second writ of error & for a similar reason. it would be vexatious. Salk 263. 1 Salk. 658. L. Ray 97. Comb 19. 393.

But if a writ abates or is discontinued by the act of God. or any inev-

-itable accident, these rules do not apply. for here the loss of the first writ is no fault of the Plffs. & the second writ would be superseded as 1 Yelv. 158. 186. Yelv. 208. More 701.

Writs of error are not amendable except to make them conform to the original record & that is done by Stat. 5th Geo. 1. and not by virtue of the Stat of profaits. for that enables amendments in affirmance of judg.t not for the reversal. 5 Mod. 16. 69. Salk. 49. Carth. 520. Com. Dig. Amend. 2 C. 4.

In Eng. a writ of error does not abate by the death of Deft in error. the writ is continued by a scire facias issued against his representative. but upon the death of the Plff in error the writ does abate. This distinction depends upon the Statutes of amendments & profaits — and I doubt whether the writ would abate in either case in our courts. — as our Stat of amendments has been very liberally expounded. — this however is mere conjecture on my part. 1 Vent. 34. Salk. 264. Yelv. 208. Carth 236.

A writ of error is not in all cases a matter that can be claimed as a right — it may be allowed or not in Eng. by the Clk of errors, & if he thinks it would be vexatory & vexatious he need not allow it. 1 Roll 492. 2 Bac. 210 Salk 624. 321. 264.

The same rule applies here under different forms of practice. For Com. if the judge who is applied to sign a writ of error, thinks there is no probable ground of error

"&c. if a new trial should be granted after prisoner had been acquitted of treason or felony.

it is his duty not to sign it. for it would be doing injustice to stay the Ex.n 2 Lev. 277.

Error is not in grant. predicable of proceedings that are entirely discretionary as I before observed under the head bills of exception (see ante) as the proceedings on a motion or petition for a new trial.

Our practice in such case is by petition as well as motion. and if the petition is judged insufficient on demurrer. no writ of error will lie for the judg.t

But if a new trial should be granted in a case in which a new trial is not under any circumstances grantable, or should be granted by a court which has no power to grant one as a justice of the peace error without doubt would be predicable. for this is not within legal discretion. — Kirby 41. —

I have observed that a writ of error when allowed and proper bail put in. is a supersedeas of the Ex.n and of all proceedings under it.

Yet an act.n of debt on judg.t may be maintained notwithstanding the writ for the claim is a good one until the judg.t is reversed. 3 Wils 345. 7 T. Rep. 408. 1 Sid 236. 8 Co. 142. Com. Rep 177. 8 Ray. 103. 1 Lev. 153.

But in such cases the court will or may in its discretion stay the proceedings in the act.n of

A writ of error not a supersedeas in all cases.

debt till a decision is had on the writ of error, which in many, perhaps most, cases is what justice requires. but if it appear, that the writ of error was brot. merely for the purpose of delay, a rule to shew cause, why the proceedings in such a case should not be stayed, will be discharged with costs. 2 T. Rep. 78.

When a third person obligates himself to pay whatever shall be recovered agt. another e.g. A. B. — the suit is brot. and judgt. ren- and agt. A. B. and then he brings a writ of error to reverse that judgt. the pendency of that writ bars all suits against the third person. (whom xt God himself personified in the example) on that obligation. because until the question agitated by the writ of error is determined, it is not settled whether this third person is liable or not. 2 Dun. Bl. 372.

When the Ct. errs on an original judgt. is completely executed as by taking the defts. body and imprisoning him or his goods and selling them the writ of error is no supersedeas. that is it does not discharge him from prison nor restore his goods. the effect of a mesne you will observe is different. for judgt. on a writ of error is altogether different from the writ itself. Pity. 237 4 Bac. 684. 1 Vent. 30.

If goods under such execution had been taken but not sold; the writ according to some opinions is a supersedeas. the better opinion however appears to be that it is not. on the principle that

And in Engl. the bail is liable precisely as of the first process had been rendered as to subject the bail. That is, the Eng. rule is directly the reverse of our rule.

Ex^{tion} once begun must be continued until completed, and the Plff must proceed on his suit. (2 Roll. 491. contra 2 Bac. 210 370.) Yelv. 6. 1 Vent. 255. Salk. 1 322 3 47. 2^{d} Ray 990. Bro. Eliz 597. Phillips & London 2^{d} Day.

According to Com. practice a final judg^{t} in error has the same effect as to the original bail as the original recovery judg^{t} had — and if he was not made liable by that i.e. recovered by it. he is not made liable by a reversal of it. Thus ct sues B. who being arrested puts in special bail. judg^{t} in favour of B. ct brings a writ of error & reverses the judg^{t} Bs bail is not liable. — 1 Root 567. 2 Smith 1,756.

It was formerly contended at Westminster that this was the Eng. rule but it was decided not to be. This depends upon the construction of statute. the phraseology of our stat is much like that of the Eng. ones. but they have used different constructions. Bro D^{t} 94. Stra. 419 526. 1 Bac. 212.

If the Plff in error does not assign errors the judg^{t} is neither affirmed or reversed. but remains good. and the Deft in error does not and cannot have costs. for no judg^{t} is rendered then can be none. he must sue the bail in error and recover his costs. 1 Sid 294. 2 Keb. 52.

If the Plff in error is nonsuited then is no judg^{t} of affirmance or reversal. — for the writ of error has not been tried. the Deft in error however in such case has judg^{t} to recover his

costs. The Court in this case has nothing to do with the errors assigned. as Plff is nonsuited out of court. So the original judg.t remains good.

The reversal of a judg.t in some cases overreaches & supersedes the proceedings under the original execution. and in others not. same auth.

Coke says. that collateral things executed are not divested by a subsequent reversal of the judg.t but those executory are. 8 Co 142. b. This is the general rule. Thus if Lands or goods have been taken & kept by the Shff or delivered to the creditor on appraisal. the property is restored by a reversal. for the very ground of the creditors title is destroyed. the collateral thing is executory. — 1 Roll. 77. 8. 2 Bac. 231. 2. 370. bro Jt. 246. Ydw. 179.

But on the other hand if the property taken by Ex.t is required by law to be sold & Shff sells it to a stranger the stranger will hold it notwithstanding the subsequent reversal. this being sold is a thing executed within the words of L.d Cokes rule. 8 Co 143. b. ro Eliz 278. Ydw 108. 3 Leon 89 bro Jt. 246

The remedy of Plff is not lies in damages to the amount of the property sold. the judg.t of reversal being that the original judg.t be reversed & that the Plff be restored to his damages. and for this the bail is liable 8 Co. 143 bro Jt. 246.

If a party taken in Ex.t on the original judg.t escapes before judg.t is recovered in an action against the

Shff for the escape. the original judgt is reversed. the action for the escape is gone.

But if judgt & execution had been obtained against the Shff in that action before the reversal, it would remain good the reversal notwithstanding — for in the collateral thing is executed. in the other case it was only executory — and the reversal stopped the proceedings in this it could not for they were executed & compleated. In the first case the Shff may plead nul tiel record — in the latter he cannot. altho there is an abstract error in the record. for it is of force until reversed 8 Co. 142. b.

In this latter case however the judgt lays a foundation for a writ of audita querela by which the Shff obtains relief. 8 Co. 143. b 1 Saund 38. Cro Jac. 646.

But

suppose the property to have been taken on an original execution and sold off by appraisal to the creditor, and before the judgt in his favour is reversed he sells it to a stranger the question is, is the title of this purchaser divested by this subsequent reversal? — 8 Co. 142. b. 143. b. Yelv. 108. 179. Brownlow 107. 8. 2 Bac. 231. Cro. Jac. 246. 3 Leon. 89. 5 b. 90.

If the Shff has taken property and sold it to a stranger when the law does not require him to sell it. the property is divested out of the purchaser by a reversal of the judgt in execution of which the goods were taken. and the original owner may reclaim them

goods & have an action for them. Thus if upon a capias utlagatum the Sheff sells the goods he takes and the outlawry be afterwards reversed. the party shall have his goods again — for Sheff was not commanded to sell them and if the outlawry was not reversed they belonged to the King. 5 Co. 90. 8 Co. 144 3. a Cro. Eliz. 270. 8. 3 Bac. Ab. 778.

In Cov. a writ of error is barred by stat. if not brought within three years from the day on which the original judgt was rendered, 1 Root 54. — In Eng the period is 20 years — by Stat 10 & 11 Wm 3. Stra. 857 2 Bac. 200. — In the US states courts if I mistake not it is 10 years.

When the judgment is affirmed the Deft in error recovers his costs in the judgt of affirmance. But a Plff never recovers costs on the suit in error even when he prevails. that is that an no costs taxed in that suit — (Costs being considered)

But if the judgt of reversal end the controversy (as it will in general if Deft below is Plff in error & prevails) the Plff in error recovers under the name of damages the costs which he would have recovered in the court below had their judgt not been erroneous —

But if the judgt in error does not end the controversy (as it will not if Plff below is Plff in error & prevails. that is if he even had cause of action) Plff recovers no costs. and the case

If the curve is a surface as defined ... of
form ... suitable to ... the ... when ...
... transit, ...

is retund for further trial or remanded to the court below.

The rule is that if the court to which the writ of error is brot. have power to try the issue & assess damages the cause is then retund for further trial. if not it is sent down to be proceeded with in the court below.

If the Plff in error has paid any thing on the erroneous judgt. he recovers that sum on the remand as damages. but if he has paid nothing he recovers no damages. Thus suppose the original judgt. is rendered against the Deft. and after he has satisfied it. he brings a writ of error and reverses it. he shall recover the sum back as damages but not costs. for the Plff in error never recovers costs so nominee.

If however on remand the controversy is not ended but a further trial is had the whole cost abide the final determination according to our practice. —— rules being different in different places.

If the original Plff reverses a judgt. below which was against himself and in a case where he had a right to prosecute further and does not. he looses all his costs for his not pursuing his claim is evidence that it is a weak one. Thus if Plff Dr. is judgd. insufficient on Demr. & he brings a writ of error and reverses it. if now he does not proceed in a new act. he looses his costs. if he does the whole costs follow the final determination. this is our practice. every state has

however its own rules as to costs.—

Upon a judg.t of affirmance in error the prevailing party is entitled to interest upon the original judg.t at the discretion of the court for the writ of error has suspended the judg.t and delayed the collection of it. & interest ought to be allowed. tho Statutes however leave it discretionary with us it is universally allowed. & so I believe it is generally in Eng. Stat. Con. 162. B & Pul. 29

The rule is precisely the same upon a nonsuit or retraxit. same auth.

But in case of statute or the recognizance judg.t the bail in error Ins.t is not allowed.— it being discretionary with the court which has not allowed it in this case. I suppose the reason to be that the bail is not within the Statute: it is however a rule of practice 2 T Rep. 5778 Doug 723. 2 Hen Bl. 284

(As to simplifying the effect of an affirmance or reversal of judg.t on writ of error:—

A
vs } in the court below—
B

Ca: 1.t Judg.t below for A to recover of B £20. debt & £10 costs— Judg.t reversed before A has collected any part of his Ex.t— Judg.t above is. That the judg.t below be reversed & that B recover of A £10 the amount of the costs incurred by B in the court below. But no costs are recovered by B

on the suit in error.—

Ca: 2° The case as before, except that A has collected the contents of his f. f. viz: £20 debt & £10 costs. Judg.t of reversal as before: & that B recovers £40 viz: the £30 paid to A on the erroneous judg.t & £10 costs which B ought to have recovered in the court below.—

Ca: 3° Judg.t below in favour of A as before.— affirmed in the court above — here the judg.t above is, That the judg.t below be affirmed; and that A the Deft. in error recover his costs on the suit in error. — The judg.t below is again in operation.— Interest on the first judg.t is also allowed if the court in their discretion think proper & Ex. t. if pray for it — The practice is I believe to allow it of course.

Ca: 4 The judg.t below was in favour of B the Deft. below. A by writ of error reverses that judg.t The judg.t in this case is merely a judg.t of reversal. If the court above is competent to try questions of fact (as B. R. in Eng. an S.C. in Ger) & on the judg.t of reversal, enters the cause in the court above, for trial; and on final judg.t (if he prevails) recovers, together with his debt or damages all his costs which accrued before the judg.t of reversal as well as those, which have accrued since. But he recovers no costs on the suit in error. If A had paid the costs taxed against him on the judg.t below, he would have recovered that on the judg.t in error as

damages. But it must enter the action if at all in the same term in which the judg^t of reversal is rendered. 1 Roll. 85. Practice. 2. 3.

Ca: 5th The court which reversed the judg^t in the last cas. was not competent to try questions of fact (as the Exch^r Chamber in Eng: and the supreme court of Errors in Con) the cause is either remanded to the court below. where it must be again proceeded with — or if it is ripe for final judg^t: it will be rendered & Ex^r if sued by court of Errors. 1 Day. 152 Bos. & Pull. 30. 2 Ray 10. 6 Carth 319.

Ca: 6th Demurrer in the court below to the dec^r Decr judged insufficient — On writ of error the judg^t is reversed. Here it would in general be absurd for it to enter. since his Decr is adj^d insufficient — and the def^t below never wishes to enter for trial. Still. Plff may enter; so that if his dec^r can be helped by amend^t he may have an opportunity to do it

Ca: 7th Decr in the court below adj^d insufficient. — Reversed on writ of error. — Here it enters for trial. if the court above can try questions of fact: For. he has a good dec^r & the merits have not been tried: since the court above has ordered only a judg^t of reversal, not a judg^t for it to recover; and the court above cannot on the judg^t of reversal, ascertain the damages.

Ca: 8 — Plea in bar demurred to below & adj^d sufficient

Judg^t reversed. – A enters for trial – for, as yet, there is no judg^t for A to recover. and on the face of the record, he has for aught that appears a right of recovery.

Ca: 9th Plea in bar adjudged insufficient below – Judg^t reversed – If A should enter, it would be to no purpose – B does not wish to enter: for his object is only to defend. & that object is attained by the reversal.

Ca: 10th Plea in Abatement – Judged below that the writ abate – Judg^t reversed above. – Plff enters for trial; for he has a good writ. & has a right to prosecute to final judg^t

Ca: 11th Plea in Abat. as in the last case – Judg^t of respondeas ouster in the court below – Reversed in error – A can not enter. For he has no writ – Def: may he not enter. if his writ can be aided by amendment as in case 6th

Ca: 12th If error is brought for the admission or rejection of evidence; Plff below may enter for trial. on reversal, whether he is in error, plff. or deft. – & whether the judg^t of reversal is for or against him:

Ex. gr: A's witness was excluded below – on a bill of exceptions the judg^t is reversed. A enters for trial – Now he is Plff in error and the judg^t in error is in his favour.

– B's witness was excluded below –

– Judg^t reversed. – Here B is Plff in error & the judg^t of reversal is in his favour: Yet it may enter for trial if he pleases: for he may possibly prevail, notwithstanding the admission of B's witness. –

Notes. – In all the above cases in which the original Plff is supposed to enter for trial, on a reversal of judg^t the court above is supposed competent to try questions of fact. If this be not the case, the record is remanded to the court below; and there the final trial is had – see 4th & 5th cases supra. –

When the judg^t in error puts an end to the litigation between the parties, the action is never entered in the court above nor remanded for trial. – The litigation is always ended when the judg^t is affirmed, but it is ~~sometimes~~ in many cases otherwise on a reversal of judg^t

New Trials.—

A new trial requires no definition.— it is a second trial. The mode of obtaining it in Eng. is by motion made in bank in the courts at Westminster for example, and not at Nisi Prius where the first trial was.

This motion is then sustained by granting a rule to shew cause, suspends the judg.t & prevents it being entered up, and when the rule is granted the reasons for a new trial are discussed.

A new trial may be granted at any time before judg.t but in Eng. never after. A new trial after judg.t would be perfectly unintelligible at Westminster Hall. Doug. 760

In Con however it may be granted as well after as before judg.t New trials are here regulated by the Stat. which expressly authorizes the granting of them after judg.t

A new trial may be obtained here as well by petition as motion— and I am not sure that the application by petition is not peculiar to Con. perhaps however it may be practiced in Va. In Eng. it is entirely unknown.

The petition may be brot at any time within three years.

When this country was first colonized, new trials were not known in Eng. the course was by attaint. So that our courts having no law to direct made their own rules— and new trials were not to be had except on petition to the gen.l Assem.bly this is

probably the origin of our peculiar custom. — Indeed new trials were pretty much unknown in Eng. until the restoration Stat. Con. Act. civil. Kirb 169.

In our practice I take the distinction between petition and motion to be. — That when the ground of application is something that occurs at the time of trial, as misdirection by the court, misbehaviour of the jury, improper admission or rejection of evidence, the proper application would be by motion.

But when it is founded on something newly discovered, as new evidence, or mispleading it would be by petition.

In Eng. new trials are never granted for this latter cause — for the discovery of new evidence entirely note. — But in Con they are by Stat & so if the unsuccessful party discovers that a different plea would have saved him. Petitions for this however are not common and will not be necessary except where the negligence of counsel since double pleading is allowed by Stat.

Three years from the original trial is the time limited by our stat for bringing this petition Stat. Con. 678.

This petition states the grounds of the application, and the opposite party may demur or plead to it. It is accompanied with a summons to the adverse party to appear & is signed & served like a petition in Eh or Eng.

And when the Judge at N. O. has made a mistake, the decision is in a measure discretionary, but if the point is saved at N. O. for decision in Bank, the decision must be strictè juris. principles according to law. 1 B & P. 333.

It never stays the proceedings under the original judgt. the petition is now as speedy as a writ of error is.

An application for a new trial is generally considered as an appeal to the discretion of the court. — Hence if the court discovers that substantial justice has been done, they will not in general grant a new trial, tho some mistake may have intervened. 2 Wils. 306. 7. Bull N.P. 326. 3 East 257.

Hence when a verdict is found for Defr. in what is called a hard case, as on a prosecution on the game laws which are looked upon as odious, the court will not grant a new trial, even tho there was an error as to admission or rejection of evidence or any other mistake. — ib. auth. 3 Bl. 391. 2 Salk. 116. 644 646. 648. 1 Burr. 394. 2 T. Rep. 4. 5. 4 T. Rep 469.

And there have often been cases in which the jury have raised a presumption contrary to evidence, when the court would not disturb the verdict and especially in those hard cases just above mentioned. — Thus when one was prosecuted on the game laws & the proof was positive that he shot it, one of the jury observed that he might have frightened the poor bird to death & thus the case not be within the statute & so was the verdict & the Ct would not grant a new trial altho they said that was extremely improbable. —

On the same principle the court in granting a new trial can impose such terms as they please

upon the party in whose favour the new trial is granted. as on condition that he discover certain facts under oath which are known only to him. — or admit certain facts that the opposite be relieved from the necessity of proving them. or produce certain books, papers &c which he is not bound by law to produce. — Or to consent to the extrajudicial examination of witnesses who are disabled from attending court. — But no terms can be imposed upon the other party against whom the new trial is granted. 3 Bl. 392. Salk 648.

Where the ground of the application is any matter which occurred in court at the trial. the judges who try the motion in Bank receive the facts from the judge below at Nisi Prius. that is they are certified by his report. — But if the facts did not they occur they are disclosed by affidavit. 3 Bl. 391. 2 Lev. 140. 1 Sid. 235.

I have observed to you already that error is not predicable of the proceedings upon a motion for a new trial — & I will not repeat. see Viner 21. 2 Day. 364.

By Con^n^ as I believe in the other states new trials cannot be granted by a single justice. they are grantable by Sup^r^ C^t^ & C. Pl. the other courts do not come within the statute. — Stat Con 28. Vict 9.

New Trials appear to have been very little known and rather strictly speaking not known in the ancient C. L. practice. Blackstone has traced them back to the time of Ed. 3^d^ & the time of the protectorate. & in deed they had not become

granals or regulated on thy now an until after the notice-
tion.

Originally new trials were granted only for gross misconduct
but of late yeas they have been granted for various causes — and have
contributed more to the due administration of justice than any other
improvement that has been introduced in modern times.
3 Bl. 387. 8. Salk 648. Stra 395. 1 Burr. 394. 5. 3 T. Rep. 131.
1 P.W. 213 And
of late new trials have been granted after trials at bar as well
as at Nisi Prius. this is a very good improvement although it was
formerly thot impossible, except for misbehaviour of the jury, for
the case would thus be adjudged by the same court. — but judges
sometimes give an unpremeditated opinion which they are afterwards
willing to retract. 1 Burr. 395. Ld Ray. 1360. Stra 585. 1105.
5 Bac. 243. 7 Mod. 37. Salk 648.

With regard to the general
principle the rule is that in all cases of sufficient impor-
tance a new trial may and ought to be granted, if it can be
made to appear that injustice has been done at the first trial
3 Bl. 388. 1 Burr. 395. 6 T. Rep. 638.

When however the case is of very
small consequence, a new trial will not generally be granted
for any cause. 1 Burr. 395. 2 T. Rep 758. Burr. 665. 2093. 3 Bl. 388
392.

It is a general rule of practice that a motion for a new trial
cannot be made after a motion in arrest, for by the latter mo-
tion the verdict is admitted to be good. 5 Bac. 239.

But there is an

exception to this rule when the cause for a new trial was unknown at the time of moving in arrest. Salk 647. Bull N. P. 325. 6 5 Bac. 241.

It has formerly been holden, that when there are several Defts and all convicted or part convicted and part acquitted, no new trial could be granted to any one or part of them unless to the others also for it was said that the verdict must stand or fall altogether. — This however has been overruled and a new trial may be granted for one or a part of them only. The case would be a very hard one if he could not have a new trial merely because an innocent man happened to be joined with him in the first trial. Bull N. P. 326 3 Salk. 362. 12 Mod. 275. 3 Keb 609. Stra. 814. 6 T. Rep. 619. 638.

In case of this kind when a new trial is granted to one of several Defts When the record goes down for the second trial, the one convicted in the first and he only is to be tried, for the others being once tried & an acquittal & so cannot be tried again.

There are certain enumerated causes for granting new trials which I will give you.

1st Want of due notice of trial to the Deft is a good cause for a new trial. For the Eng. practice when the Plff is about to bring his suit he must give notice of it to the adverse party but if Deft has appeared & confessed no new trial will be granted on this ground. Salk 646. Bull N. P. 327. 5 Bac. 239. as to the latter part of the rule Salk 435. L 28.

I doubt whether in

cases of this kind the court can refuse a new trial on supposition that substantial justice has been done — and the general rule that no new trial shall be granted when it has, does not apply — for the Def.t has an undoubted right to be heard in the case — and there has been no trial to which he is a party —

2. A new trial may be granted on the score of some depute disqualification or mistake in the judge before whom the trial was had. — As if it was discovered that he was interested in the trial below — so I suppose too if he was related to the successful party. this is indeed a good ground of extrinsic error. so it is a reason for granting a new trial. 11 Mod. 119. 5 Bac. 244.

And there are a great variety of instances of new trials on acct of the mistakes of the judges in point of law as the wrong admission or rejection of evidence or misdirection of the jury in point of law both these being also in favour of the successful party. 6 Mod. 242. 7 Mod. 53. 64. 10 Mod. 202. B. N. P. 327. 2 T. Rep. 573.

And new trials may be granted for these as well as various other causes after a trial at bar. and before the same judge too who made the supposed mistake. 1 Ld Ra 585. 1108. 1 Bur. 396. Doug. 420. 2 T. Rep. 5 In this last case indeed a new trial was refused because justice appeared to have been done.

But if the incompetency be not objected to at the trial, it is not of itself a substantive ground of a new trial. altho it was not known to the

only at the time of trial. when however this one other ground this is a consideration that will have some weight, 1 T. Rep. 717. — There have been two cases within my observation where a new trial was granted directly against this rule.

Altho a witness called to know a certain fact is implicitly received, yet if another witness swears to the same fact and that fact is not contested, no new trial will be granted on this ground. 3 East 451.

3. Another cause for a new trial is some defect or incompetency in the jury or in any one of the jurors — thus if a juror was one who was disqualified by law & the fact was not known at the trial in time for a challenge, — one of the cases cited below will seem at first view to abrogate this rule but it does not for the party was negligent and did not challenge when he ought. 5 Bac. 245. 7 Mod 54. 1 ~~Vent~~ 30. Stats 129.

You doubtless remember that a motion in arrest in cases of this kind is a concurrent remedy in law with a motion for a new trial.

4th Another cause of new trial is some misconduct of the jury, as partiality, bribery, inattention to the evidence or reference of the issue to chance by cross & pile or otherwise vitiates the verdict. so that not only corruption absolute but negligence & inattention are fatal to verdicts. 2 Lev. 140. Str. 642 5 Bac. 250. 288. 291. B. N. P. 327.

For the same reason a new trial may be granted for the misconduct of any one of the jurors, for

The strict Eng. rule is that the Jury are not to be discharged until they agree. except by consent of the parties & the court.

as the law requires twelve. they must be impartial every one of them. — if by whom one of the jurors dead and that Plff should not have verdict whatever evidence he might adduce. a new trial was granted B. N. P. 326. Salk 645.

In very early times perfect unanimity of the jury was not necessary. but for a long time past it has been. 3 Bl. 375. 6. 5 Bac. 289.

And the Eng. rule is that if the jury will not agree before the close of the term they are to be carried about from county to county after the judge until they will agree. — This was never done by a Con^t. 6^t but has been by the U.S. Circuit court. 5 Bac. 289.

In Ct when they do not agree they are required to hold the cause in their consideration until the end of the term. and if they do not then agree they are discharged but cannot be kept up by consent of the parties. when a venire de novo is awarded — But both in Eng & Con^t if the jury are not ultimately unanimous. their verdict is void and must be set aside. — In some cases however. where one of the jury has been suddenly taken ill. the counsel have agreed to accept the verdict of eleven. — 5 Bac. 289

There have been cases both here & in Eng in which the rights of this rule has been evaded. — the dissent of the minority is tacit assent, & not being known to the court is an implied assent — but if one does not object to the verdict recorded — he is not then allowed to testify to his dissent for it is testifying to his own misconduct. he should have done this at the time of delivery of

of the verdict 5. Bac. 290. 3 Vent 141. 416.

By the rule of the C. L. a jury to whom an issue is committed are to be locked up, confined & overlooked by a proper officer untill they have agreed in their verdict and any waiver of this restraint is misconduct & contempt. — so if they eat or drink, without leave of the court it is contempt. 5 Bac. 292. 3. 1 Vent. 125. Moor 33.

But their eating & drinking does not destroy their verdict, unless it is at the expence of the party in whose favour the verdict is found, but it subjects them to punishment — for their eating or drinking at their own expence or that of a third person is no ground of suspicion of bribery or partiality — but at the expence of the favoured party is. 1 Inst. 227. 12 Mod. 111. 1 Leon. 132 L. Ray. 148. 1 Vent. 125. 5. Bac. 293 B. N. P 327.

For the purpose of relieving the jury it has been allowed in practice both in Eng. & U. S. for the jury to give what is called a privy verdict delivered to the judge out of court. 1 Inst 228. 3 Bl. 377. Plow. 211 5 Bac. 284. 5

And yet a privy verdict seems to amount to but very little in effect for the jury are not bound by it & they may change as much as they please notwithstanding that. and if one dies before it is delivered into court it is not binding upon the party. its only effect appears to be to release the jury from their restraint so that they may eat & drink. &c. And the eating &c. do not vitiate the verdict in any case unless they afterwards before delivery

The Jury are to look upon a prisoner when they pronounce their verdict, if the offence is corporally punished

in open court. change the verdict in his favour at whose uprise they rest. — 1 Vent. 125. — for in such case there is strong presumption evidence of bias.

But privy verdict cannot be given in any case relating to life or member: nor when the personal appearance of the prisoner is indispensable to his conviction. — as criminal prosecutions for in these cases the law allows of no verdicts but such as is pronounced in the presence of the prisoner 1 Vent. 97. 2 Vent. 687. 697. Rep. 193. 5 Bac. 285. —

In Eng. a privy verdict is not known because the jurors can not confind. and yet we have a stat declaratory of the C.L. which requires them to be confind. but it has never been inforced.

It has been said that a jury have a right to found their verdict in part at least, upon their own personal knowledge, without discovering it to the court. but it is not so. after they have retired a juror has no right to give his testimony to the jurys for he is not under the witness oath & it is contrary to the jurors oath to determine upon any other testimony than that produced at the trial. such conduct will vitiate the verdict and a new trial will be granted. If a juror has important information. he must give his evidence in court. that he may be cross examined and his testimony answered to. — the other method is directly allowed to our open public administration of justice. — 3 Bl. 374. 5. 1 Chit. 139. 5 Bac. 289. (Vaughan 147. ad law.)

The jury have no right to re-examine a witness after they have retired. and if they do it vitiates their verdict

Or take with them written evidence not exhibited at the trial.

In this way means that no one juror shall be permitted to criminate himself — And besides an unprincipled juror must thus be enabled to destroy any verdict & tampering thus encouraged.

They are sworn to give their verdict on the evidence given in court besides - they are ignorant as to what are proper and what are improper questions - what evidence is relevant & what not. Cro Eliz 189. 411. 5 Bac. 288.

In the Eng. practice the jury have no right to take out with them any written evidence exhibited at the trial without the consent of the parties or leave of the court. if they do it is a misdemeanor, and if this evidence is only on one side the verdict is bad. but if on both tho the jury are punishable the verdict is nevertheless good. this distinction appears to be extremely vague. 2 Roll. 714. L. Ray. 148. 1 Inst. 227. 12 Mod. 250. Cro. Eliz. 411. 5 Bac. 291. 286.

But if they receive evidence not exhibited at the trial; the verdict is bad of course. and a new trial must be granted. 1 Sid. 235 5 Bac. 291. 4. (i.e. if the verdict be in favour of the party who delivers the evidence in those cases where it is delivered by a party). —

The misconduct of the jury cannot be proved by the jurors - they formerly were admitted to testify to their own misconduct but now they are not. the evidence must be from some other quarter. for no one is allowed to criminate himself & the rule now is that a juror shall not be permitted to testify. 1 T. Rep. 11. Barn 438. 441. Cro. Eliz 189. 5 Bac. 288

If the foreman delivers a wrong verdict by mistake it may be set aside & a new trial granted. & the jurors are admissible witnesses to prove the fact. — 1 Bur. 383.

The jury's finding a general verdict

when directed by the court to find a special one is not regarded as mis conduct — but if in such case they the verdict is agt the opinion of the court. there may be a new trial granted this finding a different verdict is only an auxiliary reason. & is not sufficient per se:— 1 P. Wms 213. 5 Bac. 251. 2 Mod. 37. The latter case cited seems at first to impugn this rule but that was a motion after trial at bar. —

6th Another ground of new trial is both in Eng. & this country, that the verdict is contrary to evidence —

This rule has been much objected to as if the court was usurping the province of the jury, but this is not the case. for the court do not decide the issue. they only refer it to another jury & it would be amputating the very right arm of a court to deprive them of this right. 2 Stra 1105. Bull N.P. 326. 7. Comyn 37. 3 Bl. 392.

This is a subject on which the administration of justice in any country depends with regard to the rights of a person in the trial by jury — such a power is absolutely indispensable — for there cases in which the verdict is fully against evidence that the Court cannot but presume corruption in the jury — In Penn. There were three or four successive verdicts found so palpably against evidence that the Judge granted four successive new trials. and at last the Plff was obliged to compromise. —

It is to be observed however that a new trial is not to be granted merely because the judge

think that the evidence preponderates against the verdict. but when the verdict is decided by against the evidence then ought to be a new trial. Mr Blackstone says that it is not granted when the scales of evidence hang manifestly equal: that which leans against the former verdict ought always very strongly to preponderate. 3 Bl. 392 Stra 1142. B. N. P. 326. 7. Barn 322. 5 Bac. 247.

7th Another ground for a motion for a new trial is that the jury have given a verdict on a misconception of a point of law or with against law. — Of this discription there are not many cases you will perceive that they occur either when the facts are agreed upon or the evidence is perfectly clear. and the jury make a wrong conclusion from them. Salk 646. Comy 402. 2 Bl. Rep 1087. 2 Wils. 307. Stra 1225. 4 T. Rep. 470. 1 John. 279.

But a new trial is never granted for this cause when the case is what is called a hard one or where substantial justice has been done.

But if the judge make a mistake as to the law the court feel themselves more under an obligation to grant a new trial than when it is made by the jury. 2 T. Rep. 5. 5 T. Rep 425.

And upon this principle of discretion if the Plff is in point of law entitled to but nominal damages and a verdict is found for Dfts the court will not grant a new trial: because it is a matter of small consequence & the motion is made merely for the indulgence of passion and the law will not assist the evil passions of men 4 Burr 2093

4 T. Rep. 758. 5 Bac. 246.

8th Another cause of new trial is the smallness of damages. But it is never granted on this ground except in actions on contract or for some liquidated sum. in case sounding in tort new trials are never granted for this cause — If the act. is for a liquidated sum or on bond or note without indorsement and no evidence of payt and the jury find but half the amt it is the duty of the court to grant a new trial Stra. 940. 1051. Barn 332. 366. 33. 1 N. P. 327. 4 T. Rep 655.

Barns in pp. 354 thinks this rule should also apply in case of torts. but the courts have not adopted it —

This rule however does not hold when the jury have made the damages too small through any mistake in point of law. as supposing one of Plff's witnesses incompetent when it was not so. —

Or when Plff has been deprived of his just damages by the fraud or unfairness of Deft — Or if the Jury make a wrong computation as in adding to gether distinct sums. — In these cases you will observe however that it is not the smallness of damages per se which occasions the new trial, but fraud or mistake which contributes to it Stra. 425. 1259 Salk. 647.

9th Another ground of new trial is excessive damages — and is good ground of new trial both in case of contracts & torts. as to contract there is no difficulty in applying the rule. B N. P. 327. Com. 17.

1 T. Rep. 277. Salk 649. 1 Burr. 609. 3 Burr. 1846. 4 T. Rep. 657. 5 T. Rep. 257. 7 T. Rep. 529.

It has been laid down and strongly urged by some, that the excessiveness of damages is not a good cause for a new trial, unless it is so enormous as at first blush to excite presumption of partiality in the jury. But the rule is that if the judge who is to be supposed conversant in cases of the kind, thinks the damages enormous he may grant a new trial — D. Comden is of the former opinion (above) — Comyn. 231.

The rule then now is that new trials may be granted for this cause both in actions on contract and in those sounding in tort.

There has been no instance of a new trial granted for this cause in cases of crim. con. D. Kenyon doubts whether a new trial could not be granted in such case as well as any other. Buller thinks there may be cases of this kind in which it might be granted, and I can see no reason why it should not be. 4 T. Rep. 651. 5 Bac. 250. 5 T. Rep. 257.

New trials have been granted for excessive damages in cases of assault & battery.

In actions relating to property the damages are more certain that is there is a standard in a degree definite — But in actions for personal injury, damages are more presumptive the ground being more vague 1 T. Rep. 277. 5 T. Rep. 257

It seems well established that a new

trial may be granted for excessive damages in case of slander
Stiles 262. 1 T. Rep. 277. 2 Wils. 249. Salk 644. 1 Burr. 394
1 Lev. 97.

I believe however that the true rule is laid down by L^d
Mansfield in 1 T. Rep 277. viz. That a new trial may be grant-
ed for excessive damages in any case whatever. and that it is
a matter entirely discretionary with the judge. this opinion
is well supported by modern authorities. Com. Dig. Trial C 1
4 T. Rep. 657. 2 T. Rep 166. 5 T. Rep 257. 2 Bl. Rep. 924.
1327.

There is another class of cases in which a new trial may
often be granted beside that above mentioned viz. in acti^n
on the case per quod servitium amisit. both by a parent
for an injury done to his child. for here the damages are in
a great measure presumptive. 2 T. Rep. 5. 167. 3 Wils 18.

Where
excessive damages are given by the jury by mistake in the com-
putation. no new trial will be granted if the P^lff will
agree to release the excess. the verdict will be good for
the residue. & P^lff may take judg^t for it. — 2 T. Rep. 113
123. Stat. Bills 213. 1 Hen Bl. 88. Comp 571. 2 Wils 262
1 East 637.

Altho the former rule has been adopted where
the mistake was occasioned by a false estimate made
by P^lff on which the jury relied. For altho P^lff de-
serves no favour. Def^t shall take advantage of the
releases. 1 H. Bl. 88. — Stat. Bills 213.

10th Ld. it is by Stat a cause for new trial that the parties counsel have made a mistake in the pleadings by pleading a wrong plea — that pleading an defence that would not avail him — when he might have pleaded one that would. Stat. Car. 28. acc. civ.

But I find no gen. rule in the Eng. practice corresponding to this. And it would seem from what we can find in the Eng. books that this is not a cause for new trial in Eng. 3 Bur 1385 2 T. Rep. 131. 10 Mod. 202. 3. 1 East. 637.

And it is certainly a general rule that the neglect of counsel is not a cause for a new trial. The remedy in such case is by an act. against the atty or counsel — for it is his fault entirely. 3 Salk 245. 6 Mod. 22. 222. 5 Bac. 257.

And in Car. where misleading is by Stat made a cause of new trial, I should doubt whether the court would allow a new trial for the purpose of letting in any unconscionable defence as infancy, coverture, usury, Stat of limitations &c. and I take the principle to be that these defences are founded in public policy & convenience & do not affect the real rights between the parties themselves — indeed they are directly opposed to the private justice of the case being regulations for public con. 1 Bl. Rep. 35. Stra 1242. 1 Bay & Pl. 52.

In Car. when an petition for a new trial on the ground of misleading, he must state in his petition

the plea that he wishes to make that the Court may determine whether it is sufficient in law & that he is able to prove it.— 1 Root. 573. 2 Swift. 271.

It has been a subject of considerable controversy how far new matter set the original trial is a ground for a new trial — a party may be surprized and disappointed by the introduction of unexpected testimony, which, if he had known of before, he might have been prepared & able to resist or effectually to answer.—

In Conn. there have been new trials granted on this ground or in case where this was the chief matter.—

In the Eng. practice this is not, per se, a substantive ground of new trial.— The court will, with the circumstances it will have some weight. 1 Bl. Rep. 298. Com. Dig. Trial E. 1. 2 T. Rep. 131. 3 East 167. 222. 2 Atk. 314. Stra. 691.

11th & sixth cause of new trial is, some inevitable accident which prevents the attendance of a material witness as the infirmity of age or sudden illness. 6 Mod 22. 11 Mod. 1 5 Bac 252.

In this case however the court will not grant a new trial unless the witness make affidavit of what he can testify; that the court may discern whether it is material. Salk. 645. 5 Bac. 252.

And in Con. where the application for a new trial on this ground is by petition, the petition must state the testimony & before the new trial will

be granted the witness must testify on the hearing of the petition what he knows — that the court may determine whether his evidence is material. —

If the attendance of a material witness is prevented by the fraud or practice of the opposite party a new trial will be granted. as if he hires bailiffs, arrests, or falsely imprisons him the reason is the case is manifest. 11 Mod. 111. 5 Bac. 252.

But when a witness known material is wilfully absent or by his own neglect no new trial is ever granted & the Eng. courts in such case have refused even to grant a rule to shew cause. that is to hear the reasons alledged, in such cases the remedy is by the witness and the courts generally encourage.

This rule however is very reasonable & if the witness does not attend when properly summoned the court will grant a capias for the sheriff to take & bring him into court. — and will sometimes postpone the trial until he can be had but will seldom grant a new trial. Salk. 653. Burn 322 5 Bac. 251

And the court will never grant a new trial for the absence of a witness whose testimony might have been obtained by due diligence. And it is not enough to say that such a material witness was absent, but it must be shewn that the absence was inevitable, or occasioned by the fraud or practice of the opposite

party & without such specification. the answer that the testimony might have been had by due diligence is sufficient. Stra. 691. 1 Wils 98. Bac. Abr. 194. 2 Mod 22. 1 Salk. 647

A new trial is now granted upon a supposition that a material witness made a mistake in his testimony in the first trial, or forgot some material fact which he might have testified — for this would be of dangerous consequence & no one knows to what length it might be carried if a party was allowed to tamper with the witness & excuse his influence over him. 5 Bac. 252. Says. 28. and this rule in Engd & Va.

12th The discovery of new evidence after trial which is material has been said to be a good ground of new trial, but the law is not so — And Ld Kenyon observes that as often as applications on this ground have been made they have uniformly been rejected. 12 Mod. 584. 5 Bac. 252. Bac. Abr. 194. 1 Wils 98. 1 T. Rep. 54. 2 ib. 113. 1 Salk 273. 7 T. Rep. 269.

In Con. this is by Stat made a sufficient ground of new trial — But before the new trial will be granted the court must be satisfied that the evidence is material and that it was discovered since the original trial. — for tho material if the party applying had knowledge of it. or if by due diligence he might have known of or obtained it no new trial will be granted. Stat. Con. 28. Kirby. 282. 2 Swift. 270. —

In such case the application must always be by petition. because the testimony is supposed to be discovered after the original suit is determined. — You can suppose a case when the testimony is discovered after trial and before the end of the term. when an application by motion would doubtless be proper.

The petition must state what the new testimony is. the nature and merits of the original action. the substance of the testimony adduced on the first trial and the name of the new witnesses who are to be introduced. the certain witnesses are named it has been determined that other witnesses may be introduced to testify to the same facts. Kirb 288. 2 Swift 270.

If the testimony stated in the petition appears not to be material. the petition is demurrable.

13th Another cause of motion for new trial is the improper admission or rejection of testimony.

If when objection made to one inadmissible witness, he is admitted by the court or proper evidence is rejected, in either case the suffering party may maintain a motion for a new trial. Par. 6 Ha. 194. 1 Bur. 394 395.

It has been said that if a cause had been tried by the testimony of a witness legally incompetent, as a convict, a new trial may be obtained by the unsuccessful party

and this has been done in Chancery, but at Law the rule has been settled to the contrary, Salk 653. 12 Mod. 584.

It may be that the party does not know the character of the witness produced on the other side; of this he must take his chance. it was formerly said that a witness might be interrogated as to the fact of his having been convicted: but the rule is now different, it cannot be in case of the record — if the record of the conviction of the witness had been produced at the trial, the judge would not have admitted his testimony; and as this was not done, the party who has been guilty of a neglect ought to suffer for it. — 5 Bac. 250 Pr. Cha. 194. Salk 653. 12 Mod. 584. —

It has also been determined that the inconsistency of a witness discovered at the trial arising from interest, is not of itself per se a sufficient reason for granting a new trial. 1 T. R. 717. Peake Ev. 187.

In Com. the rule is directly the same — and it has been the practice to grant new trials in such cases — And indeed our courts have gone further and determined that a new trial ought to be granted where the ground that the witness upon the former trial was of infamous moral character, if discovered afterwards, tho not legally infamous — then that the witness on the original trial was a man of

bad character for veracity. and this you will observe goes to his credibility entirely and not to his admissibility or competency. —

14th) Another cause for which a new trial may be granted is the misconduct of the parties. — with regard to such misconduct in relation to the jury, as tampering with them. or using any influence over them we have seen that when the verdict is in favour of such party it is void. I have nothing further to add on this subject. you may see. Mod 252. 2 Rolle 716. 5 Bac. 292.

We have also considered the misconduct of a party in procuring the attendance of the opposite partys witness — him being two grounds the absence of the witness, and the fraud of the party — see further. 11 Mod. 141.

Any improper practices by the parties attorney or counsel have the same effect as if committed by the party himself. — as when an Attn. wrote letters to the jury by means of which verdict was given in favour of his client. a new trial was awarded & the Attn punished for Embracery. 2 Vent. 173. 5 Bac. 250.

Any kind of embracery practised by the party or his counsel in whose favour the verdict is found, vitiates the verdict. and is good reason for granting a new trial —

By embracery is meant any practices by the party or his counsel meant to unduly influence the jury. 11 Mod 119. 1 Vent 125. 5 Bac. 250. & 31. Hawk.

It was formerly a rule in Eng. That no new trial was ever to be granted in an Act. of Ejectment. because judgt. in this action was not conclusive & a new action might be brot. The reason is that the proceedings in this act. are fictitious & thus for the unsuccessfull party might make a new fiction, beause & have the title tried again Salk 650. 5 Bac. 253.

This rule however could now apply to the practice of law. for the proceedings are not fictitious and judgt. is now as conclusive in Ejectt. as in any other action.

The Eng rule has been modified & now is. that new trials may as well be granted in Ejectt. & for the same reasons as in other actions when the original verdict is for Plff. but not when it is for Defts. except under very special circumstances.

Justice Yates remarks that a new trial is to be granted in this case when "the party praying a new trial would suffer by a change of prof "opinion" — For it is that unreasonable that if verdict is for Plff & Defts turned out that Defts should be obliged to bring a new act. when a new trial would be a readier & cheaper remedy. but if the verdict be for Defts things remain in statu quo. 2 Ben 2224. 1 Burns 323.

It was formerly held that after two similar verdicts in the same action no new trial could be granted for any cause however corrupt the jury might have been. — This however is now exploded and there are instances where there have been 4.5

6. 7 & 8 new trials — something of this kind occurred in Penn. as I observed to you the other day. Ld Mansfield says there is no ground to say that a new trial shall not be granted after a former new trial has been once granted before. 4 Burr. 2108. 3. Bl. 387. Salk 649. 6 Mod 22. 2 Lev. 97. 1 Sid. 131.

New trials are not in general granted for any cause when the exception might have been taken at the trial and is or was not taken there. — as to the admissibility of witnesses. — the presumption is that if the party had excepted no injustice had been done him. 10 Mod. 202. 3.

In general new trials are not grantable against Def^t in criminal cases. when they have been once acquitted tho they are granted in some cases in their favour when they have been convicted. — This you will observe is a general rule to which there are exceptions which I shall mention. 2 Stra. 899. 1238. 1 Wils 17. 3 Wils. 59 Comyn. 37. 1 Root 86. 7. 3

And the rule is universal in Eng^d that in criminal prosecutions for offences higher than misdemeanors. i.e. felonies. there cannot be a new trial on either side under any circumstances. the remedy is a trust in the mercy of the crown. for in those cases. which if civil, a new trial would have been granted. the Def^t is recommitted to the mercy of the crown. 6 T^r T. R. 638.

In Com. new trials are grantable in favour of Def^t in capital cases. but never in favour of Pl^t

State. & this I believe is the practice of the circuit Ct. of the U.S. 1 Root. 86.

But both in Eng. & Con. when the offence is not higher than a misdemeanor that is in all but capital cases, the court may grant a new trial, for the same reasons that they are granted for in civil cases - as in indictments for perjury and libel - 6 T. Rep 638. Ld Ray. 63. 5 Burr. 2667. Doug. 760 1 East 159.

But when the offence as in the last mentioned may not exceed a misdemeanor, the general rule is, as laid down but in viz. that a new trial cannot be granted against the Defr. tho it may be for him. Stra. 899 1238. 101. 1 Sid. 154. 1 Lev. 124. Ld Ray. 63. 2 T. Rep 484 1 Wils. 1. 3 Wils 59.

This rule however is confined to such cases as are strictly public or criminal as by indictment or information - For of late new trials are granted even agt. Defr. in a.c. on penal statutes for any mistake of the judge in point of law - thus in act. to recover the statute penalties for usury - this distinction seems to be founded in the difference of the proceß.

But, it does not appear that a new trial was ever granted against the Defr in such an action because the original indict was against evidence.

The rule is then that in actions on penal statutes, a new trial may be

granted against the Defr. if a mistake of the judge in point of law has contributed to his acquittal but not because the verdict is against evidence. 2 T. Rep. 753. 5 T. Rep. 20. 3 East 457. 2 T. Rep 758.

That no new trial is to be granted in this act. agr. the Defr. on account of the verdict being against evidence you may see 5 T. R. 20. 3 Morg. Es. 108. 1 Wil. 17. 3 Wil. 5 Ty. Stra. 899. 1238.

And a new trial may be granted against a Defr. even on an indictment for a misdemeanor. if he has practised any fraud agt. the court or tampered with the jury. but as before observed it cannot be granted for any mistake of the judge in the former trial of the indictment or for a verdict against evidence Stra 1238. Cr. Ch. 646. 12 Mod. 9. 1 Show. 336. 1 Rool. 93. And even this rule has been denied but Hawk. it to be well established you may see contra. 1 Lev. 124 Cited. 1 Ld. Ray. 63. 1 Sid. 153. 1 Lev. 9. Salk 646.

But that a new trial will be granted a Defr. in all cases short of capital when he has obtained an acquittal by fraud see further. 5 Bac. 251. 1 Sid. 154. 1 Lev. 9. Salk. 646.

But when the prosecution is given home. if a new trial cannot be granted according to the distinctions above made, for the criminal part, as the fine & imprisonment, there can be no new trial at all. for there can be no new trial to investigate a part of the [illegible] viz the damn

a gift or forfeiture which the Executor claims. 1 Root 86.7

It has been observed that new trials may be granted after a final judgt on the original trial. — The granting of the new trial in such case vacates the judgt that is to say when the grant is unconditional & final. — & the rights are determined by the second trial.

It has been decided in Con. that petition for new trials are within the Statute of amendments — as to the death of a party: that is the petition does not abate in such case tho' the death of the party would not have destroyed the original action. — Stat. Geo. IV. c. admitted.

With regard to the Costs on new trials. In Eng. where the costs are directed to abide the final event. If the party who was successful in the first trial succeeds in the second. that is, ultimately succeeds he obtains the costs of both trials. — But if the party who obtains the new trial succeeds in it. he obtains the costs on the second trial only. and the costs of the first trial are not awarded on either side. 8 T. Rep. 619. 1 Harry Bl. 639. 641. 3 T. Rep. 507.

But when a new trial has been granted and nothing was said in the rule concerning ~~the taxation~~ the costs of the first although the same party

succeed in the second trial, he shall not have the costs of the first — Doug. 421. 3 T. R. p. 508. 1 T. R. p. 267. —

In cont. the costs as a gen. rule abide the event of the last trial.

Pleadings in Chancery

Of the manner in which suits in Chy are instituted & conducted.
A suit in Chy is commenced on behalf of a subject by presenting a bill in nature of a petition to the Chr or to the King if the Chr is a party Mitford C.P. & Vent 385.

In Chr the petition is to the supr or Chy Chr sitting in Chy or as a Ct of Chy.

If the suit in Eng is in behalf of the crown. the complaint is called an information. exhibited by the Attg Gen. or Solr Genl Mit 7. 22 1 Vern 237. 370. Hob 109. & Bur. 2527.

Suit by bill or information in Eng is usually called suit by Engh bill because both have in genl been in the Eng language Mit. 7.8. 1 Rolle 16 L.

Every bill must be founded on one or more of the grounds of equitable jurisdn - which in some case extends to a decision of the subject in controversy. 1 Mit 8. 32. 6. 7 It some times is only to the decision of another court on future suits. Mit. 8. 32. 52. 121. 30. 28. 50 In the former relief is prayed in the latter not. In some cases also when there is no actual injury - provisional relief may be prayed agt a threatned wrong Mit. 8. Pau. 61. 531 1 Atk. 284.

And in Eng the high Ct of Chr has cognizance of bills for the removal of suits from an inferior equitable jurisdiction to itself by writ of certiorari Mit. 8. 9. not so here.

Every bill except that for a certiorari requires an answer by Defr This is in writing & becomes part of the court roll called here

the record Mit. 9. 222.

In Engd the answer is under oath. except when a Peer or Corpn aggd is Defts. – In the first case excepted it is made upon the honour of Defts in the last upon the Corpn seal Mit. 9.

The objects proposed in requiring and answering are to supply Plff with proof to discover what Defts denies & the grounds of the defence. When the sole object of the bill is discovery the answer is required to compell the discovery Mit. 9.10

To every bill except for extortion Defts must make a defence in some way unless he disclaims all right to the subject in question & he must make ans. unless he disclaims or can deny Plffs right to compell an answer Mit. 10.11. 9, 7. 8

In Bs. on a bill for discovery Defts is bound to ans. under oath as in Engd 1 Root. 581. Formerly how. the answer was given in Bs. viva voce. not so now in gnl. tho the old mode I believe is still practised. when the enquiry is a simple one.

In other cases Defts is not compellable by our practice to make any other answ. than that the allegations in the bills are not true. & even this is seldom done. 1 Root. 581. The hearing is usually as on bill & bro. at large when the petition is not answered to.

The Defts may indeed make a particular answer in every case. But except where a discovery is sought the Bs. will not now allow it to be given in under oath. Hillhouse vs Kirby N. H. Bch. 1 Root 581.

In Bs. when Plff compels a discovery by Defts under oath the

cannot contradict his testimony by other evidence. 1 Rob. 582. not agreable to the Eng. principles. —

The grounds on which defence may be made are various - some of them extend only to the relief prayed not to the discovery; some to the discovery only & some to both; an immaterial discovery never compelled Mit. 11. 2. 102. 118.

The defence may be founded 1st on matter apparent on the bill or some defect in it. in which case the defence is by demurr. Mit 13. 2. 92

2° on matter not apparent &c but stated by Defr. to defeat the claim with a formal answer thereto Mit 236. 9. In this case the defence is called a plea. Mit. 13. 4 The plea is confined to one point or ground of defence as at law. Mit 15. 17. 233. 5 & is a sort of special answer.

3° On matter in the bill & other matter offered in the defence. so that judgt. is to be given on the whole case as disclosed on both sides; In this case the defence is termed an answer Mit 13. 4

All these modes of defence may be used in one case if applied respectively to diffr. & distinct parts of the bills. Mit 13. 4. 98

But Defr may avoid the necessity of defending at all, by disclaiming all interest in the matter in question — This proceeding is termed a disclaimer. Mit. 14

A demurr admits the allegations demurred to, & a judgt upon it is in favour of Defrs. puts an end to the suit. or to so much of it as the demurr extends to Mit. 14. 5.

If demr is overruled Deft may make a new defence. This may be done by plea, ans. or demr like interim: but not by a demr of the same kind Mit. 16.7. Proceedings in the new defence are the same as on the original one.

The plea admits for the purpose of trying its own validity, all the allegations which it does not deny Mit 15. 238. 2 Atk. 51.

But a judgt on the sufficiency of the plea is not definitive. If in favour of Deft Plff may afterwards deny the truth of it by rejoinder & thus close an issue in fact upon it. Mit. 15. In this case the rejr close the pleadings. 16. 15.

If the plea is overruled i.e. judgt upon it for Plff Deft may make a new defence by ans. demr. or a new plea. Mit. 17. Dw? is a new plea all in 6.

The answer generally denies the Plff allegations or a part of them & states other facts to shew the Defts rights in the subject of the suit Mit. 15.

Sometimes however it confesses all the Plff allegs & with or without stating other facts submits the case to the judgt of the C. Mit. 16

If the answer admits the material allegs in the bill & states no new facts, or such only as Plff is willing to admit, no further pleading is necessary & judgt is definitive Mit 17.

But if the answer does not admit the material facts or states any which Plff will not admit, the truth of the answer of any part of it may be denied by a rejr which concludes the pleadings. Mit 16. 255

The disclaimer as it admits no right in Defts & denies none claimed in the Bill admits of no further pleadings. Mit. 17.

If the sole object of the suit is a discovery the answer containing the discovery closes the proceedings. Ib.

Where a suit is brot to remove a suit from a lower jurisdictn there is no defence & of course no pleadings beyond the bill. Ib. 17.

Where the bill itself is defective or the suit in its original form proves inadequate to its object by reason of intervening accidents as often happens a new suit may become necessary to add to continue or render effectual the original suit. Mit. 18.

Thus a suit commenced by one may render a suit by another necessary either for the purpose of defence or of a full decision on the rights of all parties. A judgt rendered may in some cases be suspended or avoided by a second suit. or a second suit may be necessary to give effect to a former judgt. Mit. 18.

Suits for any of these purposes are commenced by bills — Hence arise many of the divisions under which the different kinds of bills are classed. Mit. 18

Errors & defects in the draught of the bill are generally rectified or supplied either by amendment or a supplemental bills. 1 Root. 579. Thus in the answer by amendt or a further answer. Ib. Mit. 19.

By & agt whom a bill may be exhibited. —

Regularly all persons & bodies politic may exhibit bills in Eq. tho in Eng. attorney. Ex comn. attainder &c are to a certain extent

disqualifications. Mit 24.

But infant, femme, coverte, idiots & lunatics cannot sue in Ch^y. by themselves alone. Ib. 24. 5. 188. Stra. 708.

An infant in Eng^d. sues in Ch^y by his next friend. But the court will permit any person to commence a suit in that character for an infant. Mit 26. 188. Pr. Ch. 376. 1 Ath 570. And the consent of the infant is not necessary. Mit 28. 94. Jeffreys v Bishop Sup^r. Ch^r. Lit. R. 64.

The next friend is liable for the costs. Mit 26. Stra. 708. 2 Eq. Ca. 238. 2 P. Wms 297.

Tho if the infant attains 21. & then proceeds in a suit thus commenced. he is liable for the whole costs. Stra 708. Mit. 26.

Neither his next friend nor his wife can testify in the suit - he being interested in the event so far as respects the costs. But if it be necessary his name may upon application be erased & that of another inserted Mit 26. 3 Ath. 511. Stra. 708.

Tho the infants consent is not necessary (unto) yet if it be represented to the Ch^r that the suit is not for his benefit the Ch^r by some of its officers will enquire into the fact & if the representation be found true the proceedings will be stayed. Mit 27. 3 P. Wms 140.

If two suits are commenced for the same purpose by two next friends. the Ch^r will enquire which is most for his benefit & stay proceedings in the other. Mit 27.

An Ch^r Infants sue in Ch^y as at Law by guardian or next friend

Suits in favour of femes covert are regularly instituted by husb. & wife jointly. Mit. 27. 95. 188.

But when she claims a right in opposition to her husband, the suit is brot in her name by her next friend. But a bill in such can cannot be filed without her consent. Mit. 28 2 Vs. 452. Pre. Ch. 376. If her husband is banished or has abjured the realm &c she may sue alone. Mit. 24.

Idiots & lunatics sue in Eng. by the committee of their estate: i.e. those to whom the custody of their persons & estate are committed by the L. Ch and V. Mit. 28. 188. 2 P. Wms 106. 7 1 Eq. Ca. Abg. 279.

Tho the Att. Gen. has in some instances exhibited informations for them they being considered as under the peculiar protection of the crown. Mit 28. & Bro Pa. Ch. 559. 1 Cha. Ca. 112. 53.

In Ch.

they sue by their conservator, appointed by the Ch. of Com. pls. H. Ch. 233.

Bills in Chy. may be exhibited against all persons & corporations Mit. 29.

When

brot against a feme covert her husband must regularly be made a party - exc. in the case of his banishment. abjuration &c. Mit. 24. 9. 95. 6. 3 Atk. 473. 2 Vern 104. 613. If she claims in opposition to him or disapproves of his defence. she may obtain an order to defend separately 2 Atk. 50. 2 Eq. Ca. 66. If husb. is Plff in a suit & makes her deft. no order is necessary. 3 Atk. 478. If he is out of the jurisdiction or cannot be found 2 Vern 612. Pre. Ch. 323. In all these cases she defends as a feme sole. Mit. 95.

In Ch. when an infant is sued in Chy. his

guardian is always cited to defend as at law. In Eng he is sued alone & the Ct. appoints a guardian ad litem. 2 Bac. 680 Stra 369. Mit 94. So if Deft is by age & infirmity reduced to second infancy. Mit 94. Bro. Cha 239.

When an idiot or lunatic is sued the committee of his estate must be made a party Deft in Eng. his commission in Ct. Mit 29. 94.5 Coxe. 333. The committee is appointed by Ct of course guard for that purpose — If it has no Committee or the Committee have an adverse Int. the Ct. will appoint a guardian ad litem Mit. 95.

Generally distinct & separate claims in diff. rights standing in the same relation cannot be joined in one Bill Eq. Lands contracted to be sold in parcels to several. They cannot join in a bill for specific execution 1 Ball. 227

Of the several kinds of bills.

Bills are divided into three kinds. 1st Original bills. These relate to some matter not before litigated in the Ct. by the same parties standing in the same interest. Mit 31. Hinde 19.

2d Bills not original which are either in addition to or continuances of an original bill or both Mit 31. 53.

3d Bills in the nature of orig. bills — these are bills occasioned by some former bill &. the object of them is to obtain the benefit of some former suit or judgt. or a reversal of some former decision. Mit. 31. 3. 4. 6. They are not strictly orig. bills. because they relate to matters be-

for litigated &c. Are Strictly bills "not original" because they are not in addn to or continuance of any orig.l bill. but such a sort of orig.l relief.

1st Original bills. These are divided into bills praying relief: & bills not praying relief. Mit 32. a bill praying relief: may be first a bill praying the decree of the court respecting some right claimed by the Pltff in opposition to some right claimed by D.t Mit 32 2d A bill of interpld.r i.e. a bill claiming no right in opposition to the right claimed by Defts but state praying a decree to ascertain the right of Defts for the safety of Pltff. Mit 32. 47.8. 125. Hinds 26. 3d a bill praying for a writ of certiorari to remove a cause from an inferior jurisdiction. Mit 33. 49. Hinds. 28.

Original bills not praying relief are of two kinds 1 Bills to perpetuate the testimony of witnes Mit. 33. 50. 130. 2d Bills for discovery of facts resting in the knowledge of Defts or of deeds writings &c in his custody or power. Mit 33. 52. 130. 43. Hinds 32.

II Bills not original. These are of three kinds. 1st a supplemental bill - a bill of this kind is merely an additions to the orig.l bill. Mit 33. 1 Root. 179. 2d Bills of revivor - a bill of this kind is a continuance of the orig.l bill. when by reason of the death of a party or the marriage of a fem. Pltff. the suit in its original form cannot proceed. 3d of revivor & supplemental a bill of this kind both continues the original suit & establishes defects arisen since its institution. Mit 33.

III. Bills in the nature of orig.l bills. Of these the subdivisions are numerous.

1st a cross bill

inhibited by Defts. agt. the Plff or other parties touching some matter in litigation. Mit. 75. 2d a bill of review to examine & reverse a decree upon a former bill. Ib. 78 &c. 3 a bill in nature of a bill of review brd. by one not bound by the former decree. Ib. 83. 4th To impeach a decree on the ground of fraud. Ib. 84. 5th To suspend a decree under spect. circumstances or to avoid it for reasons accruing subsq.t to it. Ib. 85. 6th To carry a decree into execution. Ib. 86. 7th In nature of a bill of review. Its use in certain cases which do not admit of a continuance of the original bill. Mit 66. 88. 8th In nature of a supplemental bill. Mit 34. 5. 67. 89.

Of the structure & end of the several kinds of bills. 1st Original. 2d Not original - 3. In nature of original -

First of original bills The consideration of this will in a great measure involve the consideration of bills in general.

1st Those praying relief. 2d Those not praying relief.

First

Original bills praying the decree of the Ct respecting some right claimed by the Plff in Act.n to some right claimed by Defts must show the right or interest of the Plff - the nature of the injury - or in what he needs the assistance of the court & that he is without adequate remedy at law. Mit 37. 46. 1 Scot 178.

In Eng the bills always prays that the Defts may answer upon oath the several matters charged. Mit 37. 43.

In Con. the Plff does not pray an answ.r by Defts except in bills for discovery

(of which Root V. in case in which he is willing to rely upon the Defts evidence & in this case he must state that he cannot obtain other evidence. In this way he may pray for discovery only or for discovery & relief as in Eng. & he may pray a discovery as to part of the bills only & prove the rest by Ct. evidence. 1 Root 578.

The prayer for an ans. is that the Deft may answer not only according to his knowledge but according to his remembrance information & belief & to prevent evasion he may insert specific interrogatories respecting every mat. fact alleged. Mit. & 3. 4

The bill then prays for relief the nature of which is various according to the nature of the case Mit. 37. 8. 45. The usual mode is to pray for the particular relief to which Pff thinks himself entitled & then to add by way of caution a gen. prayer for such relief as the case may require. Mit. 38. 9. 45. 2 Mod 92. 2. 1 Root 578. — Or the prayer of the particular relief may be framed with a double aspect i.e. it may ask for this or that relief in the alternative as the Ct. may judge proper. Mit. 39. 2 Edth 325.

But it seems that a prayer of gen. relief is of itself sufficient & that the Ct. may upon such a prayer adapt the relief to the case. Mit. 38. 9. 2 Edth 3. 141. 3 ib. 142. 2 Vez 235. 1 Root 578.

Lastly the bill in Eq. prays that a writ of subpoena may issue to require Defts. appearance & ans. Mit. 37. 8. This is no part of the bill in Eq. Process is annexed to & goes with the bill.

It is in form a summons or citation to Defts. leaving it optional with him (except when discovery is prayed) to appear & shew cause &c or not; & is signed by some magistrate. as an ordinary C. L. process is.

All persons concerned in the demand, or who may be affected by the relief prayed ought to be made parties if within the jurisdiction. Pre Chan. 83. 2 Atk. 510. But if unnecessary parties are omitted, or unnecessary ones inserted, the Ct will in gent. permit the proper alteration to be made. Mit 39. The practice in Engis a change or combination of Defts with others unknown to Plff &c. for the purpose of adding other names if necessary but this seems unnecessary form. Mit. 40.

It has, when it is discovered that others ought to be added as Defts the Ct will generally on motion continue the cause that they may be cited.

What action is essential to the suit & necessarily within Plff's knowledge should be alleged positively & with certainty. as material facts at law should be. Mit. 41 1 Ves. Sen. 56. Facts. as to facts charged to rest in Defts knowledge or which if they exist must be within his knowledge - which are the subject of part of the discovery prayed. a positive allegation not necessary in this case Mit. 41.

In many cases it is necessary for the purpose of preventing any waste or failure of justice that the Ct. should make a special order or upon a provisional writs upon the merits, an decision. Ex an injunction to restrain Defts from waste at law from committing waste &c Mit. 46. after answer dissolved or made perpetual. —

In such cases it is usual to insert in the bill before the prayer of process, a prayer for the spic. order &c required. & then the bill is commonly named from the order or writ so prayed, as an injunction bill &c. Mit. 46.

Provisional injunctions to stay proceedings at law not usual I believe in Eq. The court of law will continue the suit as long as is necessary on motion.

Every bill in Eng is signed by counsel & if it contain matter criminally impertinent or scandalous, it shall be expunged & the counsel must pay costs to the party aggrieved — but nothing relevant is considered scandalous. Mit. 47. 2 Vy 24. 1 Ves. Rep. 194. Hinde 394 This is not so in Eq.

Secondly Bills of interpleader. In this Plff claims no right in abso: to any right claimed by Defts This bill is the proper remedy of a person holding property or being subj: to a duty claimed adversely by two or more persons — he not knowing to which of the claimants he ought to render it. Mit. 33. 47. 8. 125. Bunb. 303. 1 Eq Ca. Ab. 80. 2 ib. 173. 1 Bro 37.

Under these circumstances he may institute a bill of interpleader agt the claimants praying that they may interplead so that the Ct may judge to whom the thing belongs & that he may be indemnified Mit. 45. 2 Eq. Cas Abr. 137.

And if a suit at law is already commenced agt him by either of the claimants, he should also pray that Plff at law may be restrained from proceeding 'till the right is determined. Mit 48.

This bill does not extend to ordinary cases of Bail nor as the parties in this case may be compelled to sue at law. Mit. 48.

The Plff in the bill must state his own right & their mutual claims to shew that equitable interposition is necessary. Mit. 48.

As the ground of the suit is the designs of Plffs being injured. the Ct will not permit the proceedings to be used collusively to give an advantage to either party or to delay the payt of money due from the Plff Mit. 48. Therefore the Plff must annex to the bill an affidavit that there is no collusion: & if money is due from him he must bring it into Ct or at least offer in his bill to do it. Mit. 49. Bunb. 303.

Thirdly Scire facias bills. prays a writ of that name to remove a cause from an inferior equitable jurisdiction. No subpoena prayed - all manner of pleading beyond the bill. Mit. 49. The bill states merely the proceedings below. the incompetency of the Ct & prays the writ ib. 49. not known here. They pay of original bills praying relief.

III. Original bills not praying relief viz. 1st Bills to perpetuate the testimony of witnesses - 2 Bills of discovery.—

1st A bill to perpetuate &c must state the matter to which the testimony is to apply & shew that Plff has an interest in the subject. Mit. 51. Finch. R. 391. 1 Root 379.

It should also shew an interest in Defts to contest Plffs title else no use of the evidence. Mit. 51.

It should shew that the facts to which the testimony will relate cannot immediately be investigated in a Ct of law as if Plff is in the undisturbed poss. of the subject or that before an investigation can be had some material witness is likely to die or abscond the realm. Mit. 51. 131. 1 P. Wms 117.

3 P. Wms 77. 1 Atk 450. Hinde 32.

The bill then prays leave to examine the witnesses that their testimony may be preserved & perpetuated. Mit. 51. For depositions are generally taken by Commissrs. & sworn to by the Cts. For that purpose Hinde 32. 461. 2.

3dly A bill of discovery. In Eng every bill requiring an ans. is a bill for discovery or at least prays a discovery. Mit. 52. But the one distinguished by that title is one brot. for the discovery of facts resting in the knowledge of Defts. or of deds. writings &c in his custody or power & resting now-hit - 16. 52. Hinde 36.

The bill is commonly used in aid of the jurisdiction of some other Cts. which cannot compel a discovery. & to enable the Plff to prosecute or defend in a suit at law &c Mit. 52. 1 Atk. 288. 1 Vez 205. 2 Vez 451.

The bill must state the subject of the discovery the intent of Plff & Defts in the subj. & the Plffs right to a discovy. Mit. 52. Hinde 36 &c.-

When a bill seeking a discovy of deds &c prays such relief as might be obtained at law. if they were in Plffs hands. he must annex an affidavit that they are not in his custody &c & that he knows not where &c nor is in Defts hands. Mit. 52. Hinde 36.7. In case where discovery only is sought 1 Vern 247. 2 P. Wms 521. 3 Atk 132. — Qu? Is an affidavit necessary in bar. in the former case? I suppose not. Fuller case Chapt. 6.

III. Bills not orig. viz 1 Supplemental. 2 of review 3 of review & supplemental. Mit. 53 &c.

These are in addn. to, or in continuance of, an original bill or bills

Remarks. A bill imperfect in its frame may generally be perfected by amendt. But where the state of the proceedings forbids an amendt. a new bill (not orig.) is necessary. Mit. 53.

So a suit originally perfect may become defective by subsequent events, Ex. By change of Int. death of party — In these cases also a new bill may be necessary. Mit. 53.4 Hinde 42.3. Thus if the Int. of a party in the subject of a suit becomes vested in another pending the suit, the suit in its orig. form gently becomes defective. Mit. 55. Hinde 42,3 But if such change of Int. is occasioned by the death of a party whose Int. is not determined by death, or by the marriage of a feme Plff the suit becomes in part or whole discontinued Mit. 55. & if the party dying a female marrying is Plff the whole proceedings are in general discontinued. ib. 1 Eq. Ca. abg. 1 Hinde 26.

Upon the death of a Deft. also all the proceedings abate as to him & his Int. but the marriage of a female Deft. does not discontinue the proceedings Mit. 55. 4 Vin. 127. 1 Vern 318. 1 Vy. 182. Husband should be named in the subsequent proceedings.

But if the Int. of a party dying determines absolutely so as no longer to affect the suit, it does not abate Mit. 57. Ex. death of Tent. for life. So if the Int. of the party dying survives to another Ex. one of two Exrs. — So if husband dies being a joint party with his wife in her right. Mit. 56. 2 Vin. 249. 3 Atk. 726. — Tho if on the death of the husband (he & his wife being Plff) she does not proceed in the cause, it will be considered as abated & the cost

liable for the costs Mit. 57.

After a decree on a bill of interpleader there is generally an end of the suit as to Plff ergo his death does not discontinue it. Mit. 57. 1 Vern 351.

It is a general rule that if the Plff right in the subject of the suit is transmitted to another pendg the cause the latter may supply defects in it. if defective & continue it if abated. Mit. 58. And if Defts right in the subject &c. is transmitted &c the Plff may perfect or continue it agt the person to whom &c. ib. — The means of supplying defects & continuing it supra &c. — 1st By supplemental bill.

When the imperfection of a suit arises from a defect in the orig. bill or the proceedings upon it & not from any matt subsequent it may be perfected by (an addn in) a suppl. bill. Ex fact discovery brought - new matter put in issue parties added - When the state of the proceedings will not allow of amendt Mit. 59. 3 Atk. 370 2 Ch. R. 142. — And this may be done as well after a decree as before. Mit 59. 3 Atk 133. 10. 217.

This bill is never allowed when the end can be obtained by amendt Mit. 60 This bill also supplies defects occasioned by matt subsg Ex by alteration in the Int. of a party — or a new Int. in one not a party &c Mit 60. 1 Atk 291 3 ib. 217.

If the Int. of a sole Plff suing in autr droit determines by death &c & another becomes entitled to it. it may be added to & continued by suppl. bill Ex. Death or removal of assignee of bankrupt. Mit. 61. 1 Atk. 82. 3 ib. 218. Pr Ch. 175. 2 Vern 237. 2 Eq Cas Ab 3. 4. — For here the question of title in the Plff is not varied -

merits the same. But if a sole Pltff suing in his own right is deprived of or parts with his Int. in the subj. pendente lite, the benefit of the suit cannot be obtained by suppl. bill. but by one in nature of &c. Ex Pltff becomes bankrpt or sells the property Mit. 62. Com. Rep. 589. — The reason is that here the question of the Pltffs title is varied, merits differed — Ex. a new orig. bill is necessary Mit. 62.

So if the whole Int. of Dft. is determined & the subject vested in another not claiming under the former, the benefit of the suit not obtained by suppl. bill. Ex. Tent. in tail Dft. dies & rem. vests. Suppl. bill lies not ag. rem. man — but one in nature of &c. Mit. 62. 37. 89. Reason. the interest & titles are distinct. new merits. new subj. matter — new party not bound by former acts — seem if Dft. Int is not absolutely determined but merely vested in another. Ex If he alien or devise: Here defects may be supplied & suit continued by suppl. bill. for the purchaser is subject to the same Equity as the grantor & suits may not thus be defeated by Dft. Mit. 63. 1 Atk. 39

2. Bills of Revivor — When a suit is abated by death & the interest of the dec. party is transmitted to his representatives as ascertained by law. so that the person only & not the title of the repr. is to be ascertained in the suit continued by bill of revivor. Mit. 63. 4. 1 Rost. 579. So if a suit is abated by the marriage of a fem. Pltff Mit. 64. the question of title is the same as before.

3. Of bills of revivor & supplemental — If where a suit is abated by death or otherwise the rights of the parties are affected by any other event as by a disp. of the subject. a bill of revivor

& suppl. is necessary to bring the case properly before the Court. Mit. 65. 6.

Suppl. bill is not suppl. because the suit requires to be continued as revived as well as added to & a bill of revivor only is not suppl. because the suit requires add. as well as revival. The bill under consideration is a compound of both. Mit. 66. 74.

If the death of a party whose interest is not determined is attended with such a transmission of the Int. that the title to it may be litigated in Ch. neither of the three former bills will give the claimant the benefit of the suit — But one in the nature of a bill of revivor. Mit. 66. 7. 88. Ex. devise of real estate merely 44. 1 Chan. Ca. 123. 3 Cha. Rep. 39. 1 Eq Ca abg. 2. 1 Vern 427. 2 Vern 528. 672. 2 Bro. Par. Ca. 529.

If the interest of the party wholly ceases & the same subj. vests in another not claiming under him neither of these bills will answer but one in nature of a suppl. bill. Mit. 62. 7. 89. Ex Tenant in tail dies, rem. vests — new title. rem. man not bound by Tenants acts. 2 Eq Ca. Abg. 3. 2 Bro. Par Ca 320 454. 5 — Pratt —

Of the structure of bills: not original

1st Supplemental — This must state the original bill the proceedings upon it and (if occasioned by any event subsq.) it must state that event & the consequent alteration in the suit & in gen. it prays in Eng. (not in Con gen.) that the Defts or such may appear & answer Mit. 69. 3 Atk. 217. Hinde 43. 4 1 Root 571

If the event requiring work an alteration in the Int. of a Deft or of a person necessary to be made

a Defr: the bill may be exhibited agt that person alone without the other Defts & may pray a decree upon the suppt: matter agt him alone unless the Int: of the others may be affected by it. Mit. 70. 3 Atk. 217.

And where the bill is filed for the mere purpose of bringing new parties before the court as Defts the original Defts need not be made parties to it. ibid.

B Bill of Review. This must state the orig: bill. the proceedings upon it & the abatement by death &c. It must shew a right to review the cause & pray that it may be revived. Mit. 70 Hinde 48. 3 P.W. 348. 1 Rost. 579 And it may be necessary to pray an ans: Mit. 71 2. The object of this bill is to put the suit in the situation in which it stood at the time of the abatement & to enable Plff to proceed in it. Mit. 72. 3.

After a decree Defr: in the original suit may file a bill of review. if the opposite party does not. for this the rights of parties are ascertained & both are entitled to the benefit of the decree. Mit. 73. Pre. Cha. 197. 1 Eq. Ca. Abr. 2. 3 Atk. 691. 2 Vern. 296. — In this case the bill merely substantiates the suit but it must bring before the Ct all the parties necessary for this purpose. Mit. 73. 1 Eq. Ca. Abr. 2.

A suit abated may be revived as to part only of the subject matter. or as to part by one bill. & as to the other by another. Ca. — when the rights of the Plff vest as his death to party in his real & party in his personal representative. Mit. 75. Hinde 48. 1 Eq. Ca. Abr. 34

B A bill of review Supplemental being merely a compound of the two former kinds. is framed & proceed with in its separate parts according to those two respectively. Mit. 74.

VIII. Bills in the nature of Orig^{ls} – of 8 Kings. Mit. 74.

1st Cross bills

brot. by Deft in a former bill pending agst Plff or other parties touching the matter in question under the former. Mit. 75 – Usually brot to obtain a discovery of full relief to all parties. ibm.

It may be brot by one or more Defts agst Plff & other Defts – This is necessary if a question arises between different Defts for the purpose of bringing the whole matter before the Ct together. ibm. –

It must state the orig^{l} bill & proceedings upon it & the rights of the parties subsisting &c i.e the grounds on which it is formed. Mit. 75.6.

It is in the nature of a defence to proceeding to procure a compleat determination of the matter already in question Mit. 76 3 Atk 312. Bard. 160. Thus when after issue joined a new ground of defence accrues or is discovered a cross bill may be necessary to take advantage of it. Mit. 76. & 3 Ch. Rep. 69.

So when a decree in its original form cannot settle the rights of all the parties as when co. Defts are of opposite interests a cross bill by one or more of them is the regular mode of bringing all the rights of all the parties to a decision Mit. 77. 2 Chc. Ca. 248. 3 Atk 110. 1 Rost. 579.

2° Bills of

review, brot to procure an examination & reversal of a decree upon a former bill – signed & enrolled Mit. 76.

may be brot upon error apparent upon the decree or upon the discovery of new matter Mit. 78 1 Cha. Ca. 53. 1 Roll. 382. Fin. Cha. 260. 3. P. Wms. 371.

When brot upon discovery of new matter it resembles in its object & effect an applic for a new trial at law 1 Root 579. When upon matter apparent a writ of error. But in Ct says I. Root if the error is apparent on the record a writ of error is the proper remedy. Qu? Does he mean thence that a bill of review is not proper in such cases. 1 Root 579. Appeal to the House lies in such cases in Eng. - But still the bill there is proper. Mit 79. 1 Vern. 416. 18 — It lies in Eng after an affirmance in the case. Qu? if the alledged error is apparent. Mit 79. 1 Vern. 416. 8.

If on a bill of review a decree has been reversed, a new bill of the same kind may be brot on the decree of reversal. it was for Eng. a lapse of 20 yrs from the time of passing the decree is a bar to this bill. & after a Demr has been allowed to one bill of review a new one cannot be brot on same ground. Mit. 79. 167. 1 Bro P. Ca. 95. 5 ib. 460. 6 ib 395. 1 Vern. 135. 417. 41. 2 ib. 120

It is a rule of the Ct in Eng that the bringing of this bill shall not prevent the Exn of the decree. If money has been decreed to be paid it is ordinarily to be paid before the bill is filed. Mit. 80. 2 Bro Par Ca. 214 This bill states the former bill. the proceedings on the decree. the point in which the Plff is aggd & the error or new matter discovered. Mit 80. 3 Ch. Rep. 45. 2 Vern. 414.

If the original decree has not been carried into Exn it is sufft to pray a reversal. If it has Plff should also pray to be restored to the situation in which &c Mit. 80.

To render this bill necessary the decree must have been enrolled before that the proceedings are in fieri. & the decree may be reversed by a species of supplemental bill Mit 81. 2. 2 Atk 420. 3 ib 311.

3d. Bills in nature of bills of review brot by one not bound by the former decree. as when the decree was agt a person having no int. or not such as would make the decree binding upon another claiming the same or a similar int. Mit. 33. 4. 1 Cha. Ca. 272. Ex. gr. Decree agt tenant for life affecting the rights of some remote man. in tail or in fee. the latter may have this bill. He must show the error in the decree — the incompetency of the former party by him for life to sustain the suit — his own right and pray a review. Defendance & answer by the opposite party. Mit. 83.

4th To impeach a decree for fraud. in this case the court will restore the parties to their former situation. Mit. 84. 2 P Wms 73. 3 Atk. 111. 1 Bro. Par. Ca. 414 — It lies not only in cases of direct fraud but in others having the same operation &c when a decree is made agt a trustee the cestuy que trust not being made a party & the trustee not discovering his similar case. Mit. 84.5. 1 Ch. Ca. 151. 2. 3 Ch. Rep. 90. So it is where an injunction decree has been made against an infant. Mit. 85. 1 P Wms 737. 2 Vez 232. The bill must state the decree & previous proceedings & the circumstances of the fraud &c. Mit. 85.

5 To suspend a decree under special circumstances. or to avoid it for matter subsq. as where after a decree of foreclosure. Mortgagor has been prevented by inevitable necessity from paying at the day. the Ct may suspend it & make a new decree upon the matter subsq. Mit. 85.6. 1 Ch. Ca. 61. 3 Atk. 256. 2 Atk. 8

6th To carry a decree into Ex. (Mit. 86) where from the neglect of parties or other causes the benefit of it cannot be obtained without a further decree. This happens gen. where the parties having neglected to enforce their rights

under it become so embarrassed as to require a new decree to settle them & in some other case. Mit. 86. 1 Cha. Rep. 128. 2 Vern. 409. Thus it may be brot by or agt an assignee to a party to the decree. Mit. 86. 1 Ch. Ca. 231. 3. P Wms 197. 2 Bro. P. Ca. 168. The court generally only enforces & does not vary the decree: & it is said that the case of a decree ought not to be examined in the bill. Mit. 87. 2 Vez. 232. 6 Bro. P. Ca. 390. 2 ib. 523. 1 Vez. 218. 39.

7th In nature of a bill of review it is brot in certain cases in which after abat a simple bill of review will not contain the suit. Ex when the int of a party dying is so transmitted, that the bill may be litigated in C.H. as in case of a devise of the estate. Want of legal privity between them forbids a remedy by bill of review. Mit. 88. 9. In such case any benefit of the original suit is obtained by this bill. Mit. 88. 9. 66 2 Vern. 584. 672. Pr. Ch. 134. 2 Bro. Par. Ca. 529. It states the orig bill & proceedings - the abat - the transmission of the int & the validity of the Plffs title. Mit. 88.

8th In nature of a supplemental bill brot to obtain the benefit of a former suit, when the int of Plff or Deft intirely every & the subject is vested in another not claiming under him. Ex Tent for life Defts die & Remr vests Subp. bill lies not neither does review. but one in nature of an Ex. bill for then an new int - new matter. new party not bound by former acts. Mit. 62. 3. 7. 89. - It states the original bill & proceedings upon it. the event which determined the int of former party & the title of the person to whom transmitted. Mit. 90. 2 Bro. Par Ca. 320. Informations follow the nature of bills. except in this style. the only matter by which Plff by way of information. Not of bill. Mit. 7. 21. 92.

Of the nature of the several modes of Defence —

Defence is made by dem^{r} plea or answer Mit. 13. L. 97. & And all three may be used if they relate to distinct parts of the bill ibm. anc.

Of Demurrer. By dem^{r} Def^{t} admits the matters of fact alleged & demands judg^{t} whether he shall be compelled to answer. Mit. 14. L. 97. 9. 3 P W^{ms} 80. 395. The principal object of a dem^{r} ere to avoid a discovery - for in gen^{l} if a dem^{r} w^{d} hold the Ct. wilo not grant relief the Def^{t} has answered. Mit. 100. 3 W^{ms} 150 12 Mod. 171.

First of demur^{rs} to origl bills & under this head. 1st of Dis^{y} to relief (which frequently dem^{r} to discovery) 2 to discovery (which sometimes consequentially affect the relief) Mit. 101.

When the discovery sought is only assistant to the relief prayed a dem^{r} to the relief will extend to the discovery - but if the discovery has a further object Pltff may be intitled to it tho' he has no claim to relief Mit. 103. 148.

1st of dem^{r} to relief. That the subject is not within the jurisd^{n} of the court is a good ground of dem^{r} Mit. 102. Dutton. Thus if Pltff has an adequate remedy at law & that remedy is clear & certain a dem^{r} will good Mit. 111. 2. 3 Atk. 744. 3 Bro. Par. Ca. 525. 2 P W^{ms} 541. 1 Vez. 346. — And where an affidavit annexed to a bill is necess^{y} in Eng^{d} to give jurisd^{n} to the court the want of it is a good ground of dem^{r} Mit. 112. 26. 1 Vez. 346. 248. Dem^{r} will hold if Pltff has adequate remedy in any Ct. of ordinary jurisdiction ecclesiastical in Eng. Rebat law Mit. 114.

In a great variety of other instances the jurisdn may be disputed in all these answrs with holds. Mit. 116. 32 So if any thing be of Equity to the proper jurisdiction of the suit. Defts may demur to the jurisdn. Mit. 134. 1 Vern 184. 1 Vez 293 4. Ex. Bill in Exchr to be jurisdn in C.B. Tho we do not usually demur to the jurisdn the Ct will dismiss it on the hearing Coin Eng. in some cases Mit. 136.

That disability in Plff if appears in the bill is a ground of demr. Ex. if feme covert or infant alone. Infts without next friend. Idiot without Comtee Mit. 135. But if the disability does not appear in the bill advantage must be taken of it by plea Mit. 135. — This objection extends as well to bills for discovy as those for relief. Mit. 36.

That Plff has no int in the subject matter or no title to institute the suit is a ground of demr. Ex. Plff claims under a will from the construction of which it is apparent he has no title. So the Admr have an int but no right to sue Ex an claiming under foreign letters of administration. Mit. 136. 2 Ch Ca 210 2 Vez 247 Finch Cha. 581 3 Pr Wms 371 Amb. 25. 2 Vez 35. This objn also extends to bills for discovy Mit. 138. 1 Vern 185 1 Eq. Ca. 234.

So that the claim is unlawful. Ex to inforce illegal contract This objn also extends to bills for discovy as well as to those for relief. Mit. 139. 0 1 Vern. 5. Finch 75

But if Plff state a concealed title tho a litigated one a demr will not hold as to the discovy Ex Adm sues touching a suit to upset the adminn Mit 140. 1 Vern 186. 3 Pr Wms 342.

Tho the Plff has a right to sue yet if want of Equity between them & Defts the latter may not be liable to the suit. if no demr holds Ex. A legatee has a right

to call on testators Debtors for the satisfaction of his Legacy. Mit. 141
2 Atk. 394.

No collusion between the pursuing suing & the debtor might afford a distinct ground of Eq. on which to claim relief. Mit. 141.

Pltf must also shew some claim of int. in Defts. suit else the latter may demur. Thus if on a bill to set aside an award - or injoin one. the arbitrators are made Defts. they may demur. & in Gen. not only to the relief but to the discov. Mit. 142. 1 Eq. Ca. 78. 2 Vern. 550. 1 Ab. 180. Tho it seems that if a bill is brot. to impeach an award for gross misconduct in Arbitrators they may be made Defts. Mit. 142. 2 Atk. 395. 502. 2 Vez. 315.

If a trustee be made Defts. in a bill ag. his cestui que trust he may demur to the relief having no int. But it seems that if a discov. is sought of his acts before bankruptcy. he must answer to that part, saying the discov. Mit. 143

If by reason of any defect in the substance of the case as disclosed by the bill the Pltf is not entitled to relief the Defts. may demur. Mit. 124.

The want of proper parties is a sufficient ground of demur. on ye Gen. Eq. Husb. seeking relief for a Legacy given to his wife. Mit. 124.5 Pr. Ch. 592. 1 Ch. Ca. 41. Finch 2. 113. 82. 302. 2 P. W. 311 31. 2 Atk. 51. 1 A. 296. For it is the object of the Ct. to do complete justice by settling the rights of all persons interested in the suit. for the safety of the parties & to prevent litigation. Mit. 124.

But a part of the creditors to the estate of a deceased person may maintain a bill in behalf of themselves & the rest. for an acct. of the estate & pay. But in this

case the others may come in under the decree. Mitf. 145. 2 Vg. 312. 3 Br. Cha. 592.

If a suff. reason for omitting a necessary party is suggested by the bill, a dem. will not hold &c. if he is resident out of the jurisd. of the C. Mitf. 146. Pr. Cha. 83. 2 Atk. 510. — So if the bill seeks a discov. of the necessary parties. Mitf. 146. 1 Vern 95.

A dem. for the want of parties must show who the proper parties are not indeed by name for this might be impossible: but by some sort of description. Mitf. 140.

A dem. has been allowed of the judg. upon dem. for want of parties. Mitf. 146. 2 Ch. Ca. 197

That the bill demands several matters of diff. nature as any one sev. Defr. is suff. cause of dem. — It tends to burden each Defr. with unnecessary costs, some of them being strangers to part of the claim. Mitf. 146. 7. 1 Vern 216. 63. Hard. 337. — So if a bill relates to only part of the controversy between the parties to prevent multiplicity of suits. Mitf. 148.

2. Demurrer to discov. — In a bill praying relief as well as discov. the latter being merely in aid of the former is in gen. incidental to it. So that dem. to the relief extends to the discov. also. Id.

But as discov. is sometimes sought with relief, it may be that S. W. in a bill praying relief may show a title to discov. tho' not to relief in which case a dem. may hold as to the relief but not as to the discov. Vice versa. Mitf. 148. 9.

When the bill prays relief, the dis-

covery is material to the relief being incidental to it a right to relief including a right to discovery. unless vesting in Defts situation renders it improper. Mit. 149. 0

But in a bill brot for discovery merely or becoming so Plff must shew a case in which the Ct ought to interpose for the mere purpose of compelling a discovy. Mit. 150. — granted in aid of the jurisdiction of another Ct to enable Plff to prosecute or defend.

But if the proceeding in the other Ct is not purely civil a demurr. to the bill will hold. Ex. Indict. or Inf.a in K.B. Mit. 150 2 Vez. 395.

So if the Ct of ordinary jurisdn in which the suit is pending can itself compel a discovy. Mit. 150. 1. 1 Atk. 288. 1 Vez. 295 2 ib. 250. Ex. as to facts in Ct.

That Plff has no int. in the subject or not such as entitles him to discovy. from Defts is sufficient ground of demurr. Ex. Bill prays a discovy. to be used in a suit to be brot &c. Ct. Suit stated a case in which it is clear action at law will not lie. Mit. 151. 222. Finch. 36. 44.

That Defts has no int. nor claim to the subject is a ground of demurr. Mit. 152. 3. 2 Vern. 389. 2 Atk. 594. 1 Vez. 426. 3 P.W. 311. the object is evidence but the answer of the party not in int. cannot be used against him in suit.

Want of privity of title between Plff & Defts is ground of demurr. Mit. 152. Ex. Litigate suing by stat. action. —

That the discovery sought is not material is a ground of demurr. Ex. If he does not shew that the discovery would apply to his case. If he

does not show a case for discovery or a cause of litigation. Mit. 154. 5. Pract. 214. 2 Vez. 361. 2 c. 4th 388. 1 Vern 262.

But in gen.l if it can be supposed that the discovery may be in any way material to the support or defence of a suit it will be compelled. Mit. 156. 1 Vez. 205.

The situation of Defr. may be a ground of discov. as if the discovery may subject him to a penalty or forfeiture, or hazard a title equal in Eq.y to Pltfs. tho not perfect in law. Mit. 157. 62. 2 Vez. 245. 1 Eq. Ca. Abr. 131. 10. Ex. gra. Df. called upon to discover an usurious contract. Mit. 157 8. 1 Vez. 246. 2 ib. 251. 1 c. 4th 455. 2 ib. 393. Finch 75. 3 P. Wms. 376

But if Pltff alone is entitled to the penalty &c. tho Pltff claims it in his bill. Defr. is compelled to make discov.y. Mit. 158. 1 Vern 60 So if Defr. by his own argument is bound to a pay.t in nature of a penalty in the event of his doing a certain act. Mit. 158. - 2nd if Defr. has covenanted not to plead or demur to the discov.y he is bound by it. penalties notwithstanding. Mit. 158. 1 Eq. Ca. Abr. 72. 3.

So Defr. is not bound to make a discov.y which may tend to show him guilty of any moral turpitude, as the birth of a bastard child Mit. 160. 2 Vez. 251. Nor when the discovery may subject him to a forfeiture of inst.e Ex. whether a lease has been assigned without licence. Mit. 160 1 Vez. 56. 2 ib. 265 2 c. 4th 392. 1 Eq. Ca. 131 So tho Pltff alone is entitled to the forfeiture discovery by the bill. Mit. 161 1 Vez. 56. 2 c. 4th 392

Defr. not bound to make a discov.y of any thing which would subject him to any thing in the nature of a forfeiture

Ex. In Eng whether he was concealed a purchaser. Mit. 161. 3 ed. 457.

If Defr has an equitable title equal to Plffs tho not perfect as law he is not bound to discover the defect in it. if the fact so appears in the bill dem.r will hold. Mit. 162. 2 Vez. 450.

On a bill for discovery merely some grounds of dem.r which would in this a case to discovery a relief in a bill for relief will not hold — Thus dem.r for want of parties will not hold to bill for discovery only for it seeks no decree nor injunc.n for want of equity in the case for same reason nor because the bill extends the discovery sought to part of the controversy only. Mit. 163.

Secondly dem.r to bills not orig.l & bill in nature of orig.l

Many of the rules given under the former gen.l division will apply to this. Mit. 164

If a supp.l bill is brot. when the orig.l might be benefited by answ.r dem.r will hold. Mit. 164. 3 ed. 817.

Dem.r to a cross bill will not hold for want of equity for Plff is brot into Chy by the orig.l Plff & a cross bill is gen.l a mode of defence. Mit. 165. Rand. 160. 3 ed. 812.

Any irregularity in the frame of a bill of any sort is a ground of dem.r Mit. 161. 3 ed. 869. Bunb. 56

Dem.r can signed by counsel - put in without oath as they assert no fact. Mit. 170

If Defr answers to any part of the bill to which he has demurred he waives the benefit of the Dem.r so if he pleads &c to the dem.r demurrer overr.d whether Defr shall answer &c and to the ans.r or plea Plff may

reply & adduce testimony – & thus proceed to a hearing. Mit. 171. 3 P. Wms. 9
2 Atk 157. 282.

Regularly after a demr. to the whole bill has been allowed there can be no amendt. Mit. 174. 15. But after demr. allowed to part of a bill the whole may be amended. for then the suit continues in Ct. Mit. 174.

A demr. upon matter of form tho allowed is no bar to a new bill, even if the merits have been decided upon it. Mit. 174.5
2 Chas. Ca. 133. 1 Vern 135. 217. 41. 2 ib. 120

When the bill itself does not disclose the whole of a case which if fully disclosed would support a demr. deft. must resort to a plea in which he may allege what Plff has omitted. Mit. 175-8. For in many cases, what constitutes a good defence by way of plea, would be a good ground of demr. if it appeared on the bill. Mit. 175. 3 Atk. 226.

II. Of Pleas. 1st To origl Bills – 2d To other bills. Mit 176
First to origl Bills. There are of two kinds. pleas to relief & pleas to discovery. ib.

1 To relief when the objection to the suit is apparent on the bill, the deft. if he would take advantage of it, must shew the court by plea or answer the special matter which creates the obj.n Mit. 179

A plea is a sort of special answer resting the defence upon some one point. The defence then which is proper for a plea must be such as takes the controversy, or a part of it, to a single point. If it depends upon a variety of circumstances or several distinct grounds it cannot be made by way of plea. Mit. 177. 234.5. Kind 179 1 Atk 54. Per Cur. the

hearing is in either case frequently at large. i.e without plea or answer.

Pleas of 3 sorts. 1st To the juris.dn 2 To the person of the Pltff or Defts 3d To the bar of the suit. Mit. 177. 8.

The objects which may be made by plea to the relief prayed are manifold. tho not precisely the same as those which are the subjects of demr. when the ground of objection is apparent on the bill. Mit. 176.

The principal objects which are to be made by plea are 1st That the subject of the suit is not within the jurisdiction of the Ct. i.e any Ct. of Eqy. of Eqy. This is called a plea not to the jurisdn. - but in bar - because it does not deny the particular cognizance of the particular Ct. (of Eqy.) applied to. - but, that the principles of Eqy. extend to the case. Mit. 178. 9. 80. 1. It goes to the merits.

2d That some other Ct. of Eqy. has the proper jurisdn. this is a plea to the jurisdiction. Mit. 178. 82. 1 Vez 203. 1 Vern 59. 212

3 That Pltff is disabled to sue by reason of some disability. Ex. outlawry Alienage. attainder &c. Mit. 178. 185. 1 Vern 184. Co Lit 134. 2 Atk 399. Ib. 57. This is called a plea in the nature of ... plea in abat. Mit. 179. 85.

4th That Pltff is not the man that he pretends to be. or does not sustain the character he assumes Ex. that he is not Ex. &c. Mit. 178. 88. 9. 1 Vern 473. This is called a plea in bar. Mit. 179

5th That Pltff has no int. in the subject. Mit. 178. 88. This is also a plea in bar. ib. 179. 89. 2 Atk 399. It extends as well to discov.

as relief. Mit. 191

6th That Deft is not liable to be called upon touching the subject in quest[n] as whom there is want of privity of title between Plff & Deft. Mit. 178.9. 92 This is in bar also. Mit. 179

7th That Deft is not the person that he is alleged to be, or does not sustain the character in which he is sued. Mit. 192. This is a plea to the person of Deft. ib. 179

8th That Deft has not such an int[t] in the suit as to render him liable to Plffs demands — Plea in bar. Mit. 191. 1 Vez. 426. But gen[l] in such case a disclaimer is proper. ib. 193.

9th That for some reason founded on the circumstances of the case Plff is not entitled to the relief prayed — a plea in bar. Mit. 179. Ex. gra. a former decree or order of the Ct by which the rights of the parties are determined. 3 Atk. 626. So that another bill has for same cause been dismissed. Mit. 192. 1 Vern. 310. — But the decree or order pleaded must be a final one or it is no bar. Mit. 195. 2 Vez. 450. — And so much of the former proceedings must be set forth as to shew that the same point is in question. Mit. 195. — 2 Atk. 603. — 2 Vez. 5[th]

The order dismissing a former bill for same cause can be pl[d] in bar only where Ct has determined that Plff has no title to relief prayed. of course dismissal for want of pros[n] is no bar. Mit. 196. 1 Atk. 571. 1 Vern. 316. 1 Bro. P. C. 281. But decree of another Ct of Eq[y] determining the rights in question is a good plea in bar. Mit. 197. 3 Bro. P. C. 582. So another suit pending in the same or another Ct of Eq[y] for the same cause is a good

plea under this head. Mitf. 197. 8. 3 Atk. 587. 90.

Not necessary that the former suit be between precisely the same parties as the latter. Ex. a Pltff sells part of the property pending the suit to B. who sues for his part. — Plea of the first suit pending will hold. Mitf. 199. 1 Eq. ca. ab. 39. — So where one part owner of a ship files a bill ag.t the Capt. for an acct. & all the owners join in a new bill — But in such case practice is to dismiss the first & direct Defts. to answer the second on costs paid. Mitf. 199. But where a second bill is brot. by the same person for the same purpose, but in a different right, the pendency of the first acct. is not a good plea. Ex. One sues as Ex.r when he is not Ex.r: then takes out adm.n & sues as adm.r Mitf. 199. 2 Atk. 44.

If Pltff has a suit depending ag.t Defts. for same cause of C.L. Defts. after answer put in, may by appl.n to the Ct. compel Pltff to elect in which Ct. to proceed. But the pendency of the suit at law is not pleadable in bar (formerly contra) Mitf. 200. 3 P. Wms. 90. But a proceeding of a Ct. of ordinary jurisdn. determining the rights of the parties is in gen.l a good plea in bar of a bill in Eqy. for same cause. Mitf. 204. 1 Vern. 297. 2 ib. 876. 13. Wms. 389. 2 d. 284.

Plea of an acct. stated is good in bar of a bill for an acct. but it must show the balance. Mitf. 208. 1 Vern. 180. 2 Atk. 1. 3 ib. 203. A release may be pleaded in bar of a bill, as at law. but it is said that a plea of release must state the consid.n upon which it was made. Mitf. 209. 3 P. Wms. 315. 2 Vez. 108. Acid. 168. 3 Bro. P.C. 366.

The stat. of frauds - in many instances the stat of limitations & other stat. may be pleaded in bar as well in Chy as at law. Mitf. 210. 2 Atk 156. Pr. Cha. 402. 533. 1 P Wms 727. 3 ib. 309. 2 Atk 395.

10th That Defts. has as high a claim to the protection of the Ct. of Ch. to defend his poss. as Plff has to assert his title is a good plea in bar. Ex. purchase of the trustee without notice of the trust. Mitf. 215. 2 Atk 389, 630 2 Vent 361. 3 P Wms 281. 1 Vern 245.

11 The insufficiency of the bill to answ. the purposes of complete justice. may be objected to by plea. This objn is usually founded on the want of proper parties. Mitf. 220. 1 Vern 110. 2 Atk 51.

Secondly of Pleas to Discovery only

1st That the case is not such as to entitle a court of equity to assume a jurisdn to compell a discovy Mitf. 222. — If the case appears upon the face of the bill to be of this description Defts may demur. Such a plea is necessary

2d That Plff has no int. or not such as entitles to discovy if this fact appears demr will hold. Mitf. 222.3 Ex. Plea that Plff owing as Exr or Exrx &c is not Exr &c.

3 If Defts has no int in the subject (tho an int in him is alleged in the bill) he may protect himself by pleading the fact or by disclaimer Mitf. 227. 1 Veg. 226.

4 If the situation of Defts renders it improper for equity to compell a discovy he may avoid a discovy by

plea. Mit 223 2. 2 Vy 225 1 Ves 109. If the fact is aff^d in the bill to any answer Mit. 157. Secus he must plead.

In Discovery

in which this plea is proper are 1 When the discov^y may subject him to punishment of any kind. If then the discov^y sought tends to prove a crime whereto Def^t he is not bound to answer. And if the fact is not aff^d he should plead it. Mit. 224. 157. Ves. 100. Ex Bill for discov^y of a marriage which if discovered would prove Def^t guilty of incest or bigamy 3 Bro. Par. C. 65. 2 P Wms 375. 1 Atk 53

2° When the discovery tends to subject Def^t to a forfeiture of int^t Ex. Pl^t for life charged with waste Mit. 226. 160. 1 Atk 526. 8. 1 Eq. Ca. Ab. 77 2 Vy. 389 if it is no where in the bill.

But Def^t

in such case is protected ag^t the discovery of no other fact than that which would occasion the forfeiture. Ergo in bar must answer the plea would not hold as to the fact of Def^t being ten^t for life but as to the waste only 2 Vy. 109. Mit. 226. 7. And in cases of forfeiture if Pl^ff alone is entitled to the benefit of it he cannot by his bill Def^t is bound to make the discov^y Mit. 227. Mosely 75.

3° If discov^y

sought is of a fact the knowledge of which Def^t acquired by the confidence reposed in him as counsel. Att^y or arbitrator in many cases discov^y by pleading that his knowledge was so obtained Mit. 227. 8. 1 Cha. Ca. 27.

4th That Def^t is a purchaser for valuable consideration without notice of Pl^ffs title is a good plea to avoid a discov^y of his title Ex. gr. Purchaser under mortgage.

the defendant being ignorant of purchase of goods of a bankrupt before the commission & upon notice of the bankruptcy. Mit. 162. 228. 1 Vern. 27. 2 Vg 450

Certiorari bills admit of no plea. Mit. 49. 228.

Secondly - Pleas to bills other than original.

Many of the pleas to orig.l bills already enumerated will hold to the other kinds of bills, according to their respective natures some of the latter admit of pleas which do not hold to orig.l bills. Mit. 228

If an bill of review is brot. without sufficient cause & this is not apparent Defr. may shew it by plea. So if the Plff is not the proper party. Mit. 228. 9. 3 P Wms. 348. — So if a supp.l bill is brot. upon matter which arose before the orig.l bill filed & this not apparent Defr. may plead it. Mit. 229. 3

A cross bill is not liable to any plea which would not hold to an orig.l bill, in nature of an orig.l bill. Mit. 330. And it is not liable to pleas to the jurisdiction of the Ct. nor to pleas to the person of the Plff unless exhibited in the name of some Defr. alone, who cannot sue alone as an infr. feme covert. idiot or lunatick. For the Plff in the original bill has submitted to the jurisdiction & obliged the Defr. to defend. Mit. 230

Of the nature of Pleas in gen.l

In pleading there must be generally the same strictness as to substance at least in Eqy. as at Law. Mit. 232. 2 Atk. 622.

If a plea

is not intended to cover the whole bill it must specify to which part it extends. Mit. 232. 3. 3 ettk 70. Mosely. 110. 2 Vy 108. — It seems that a plea ought not to contain more than one defence. Double plea informal & improper. Mit. 233. 4. 5. 3 P. Wms 325. 3 ettk 241. But a plea may be allowed in part & overruled in part. i.e. it may be allowed as to part of the bill covered by it & overruled as to the rest. Mit. 233. 5. 1 ettk 53. 2 ib. 44 155. 284. 3 ib. 589. 1 Vy. 205. Seems of Dem.r 2 ettk 284.

The averment ought in gen.l to be positive as at law — Except.s in certain cases &c That an act.n pleaded is just "according to the best of his knowledge & belief." So in the case of negative averments & averments not within his immediate knowledge. — All material facts must be clearly & distinctly averred. Mit. 236. Gil. Ca. 58

If the bill contain any clause which being unanswered would defeat the effect of the special matter alleged in the plea. the charge must be denied not only by the plea, but by answer also. In this case the answer is indispensably to support the plea — It is not a gen.l answer constituting a distinct defence. Mit. 236. 7. 9. 242. 3 ettk 304. 3 P. Wms 165. 3 Bro P. C. 373. 4 2 ettk 241. not required in our practice.

But if the plea is accompanied by answer to any part of the bill cov.d by the plea (i.e. to any part of which the plea is in avoidance) it overrules the plea. Mit. 237. 8. 54. 14. 2 ettk 155. 2 Bro Par Ca 201.

Form of Plea. a plea is introduced by protesting against the truth of any part of the bill. Mit. 238. Hind 196

The extent of the plea to the whole or part of the bill is next stated. Then the matter relied upon as a defence. It concludes with praying judg.t whether the Defd.t ought to be compelled further to answer the bill. Mit. 238. 9. Hinde. 196.

If the plea is accompanied by an ans.r merely to support it. the ans.r is stated to be for that purpose. & not as a waiver of the plea. Mit. 239.

How offered. Pleas to the jurisdn. to the disabilities of Plff or Defd.t & pleas in bar of any matter of record, are not made on oath. Pleas in bar of matter in pais are. Mit. 236. 9 Hinde 195.

If Plff supposes the plea to be insufficient in substance or form, he may take the judg.t of the C.t upon its sufficiency. Defd.t may do the same if he wishes the point determined. Mit 239. 15. — For the purpose of determining its sufficiency the plea is taken to be true as in the bill so far as it is not contradicted by the plea. Mit. 15. 238. 2 Ed. Ca. 51. But after a decision upon its sufficiency Plff may take issue upon it. Mit. 240. 15. — Or if neither party wishes to try its sufficiency in the first instance. Plff may take issue upon it without a decis.n upon its suffy. Mit. 240.

As to the effect of allowing a plea simply, allowance, reserving the benefit of it to the hearing, & ordering it to stand for an ans.r vid. Mit. 239. 43

Plff by replying to a plea admits its sufficy. — If therefore he takes issue upon it & Defd.t proves it true the suit so far as the plea extends is barred. tho the plea itself is not good. Mit. 240. 1 3 Bro. P.C. 74. 3 P. Wms 4. 5.

Of answers & Disclaimers.

If a plea is overruled Defts may insist of the same matter by way of ans. Mit. 244. 3 P.W. 95. 2 Vg. 492. 1 Atk. 450. And whatever part of the bill is not covered by demr or plea, must be defended by ans. unless Defts disclaim. Mit. 244.

The Plff in the bill is entitled to a discovy. by Defts unless he can avoid it by some mode of defence. If he does not protect himself from it by demr or plea, he may still in his ans. insist that he is not bound to make discovy. Mit. 244.5. q. 3 P.W. 238. 2 Vg. 491. 3 Atk. 276.

In this case Plff may except to the ans. as insufft. Upon this exception it will be determined whether Defts is bound to discover ans. or not. Mit. 245.

If new distinct grounds of defence which go in bar exist Defts should state them by way of ans. instead of plea: and may have the same advantage of them as if pleaded in bar. Mit 245. 1 Atk 54. 2 P.W. 145.

To so much of the bill as is material Defts must answer directly. He must confess or deny the substance of each charge. Mit. 246.7. — Particular & precise charges must be answered particularly, not generally Mit. 247. 2 Eq. Ca. Ab. 67.

If the ans. state any thing not material to the Defts case, it will on application to the Ct be expunged. So if any thing scandalous — But nothing relevant is deemed scandalous. Mit. 248. Mosely 45. 70 Finch 254 &c

The ans. usually —

begins with a renovation of all excepⁿˢ to the bill - It then gives particular answers to the sevˡ charges. consisting of a denial of them or confession of them with new matter by way of avoidance or both. Mitf. 249. - It concludes with a genˡ denial of all other matters contained in the bill - This is unnecessary & absurd if the whole is before answered as is usual. Mitf. 249. 2 P. Wms 2ᵈ

When Defᵗ is an infant the answer is supposed to be by his guardian - In this case the reservation of excepⁿˢ to the bill & the genˡ. answer at the conclusion are omitted - For he is entitled to the benefit of every exception of course & the answer cannot be excepted to for insufficiency. Mitf. 250.

The answer of an idiot or lunatick is supposed to be by his Commᵗᵉ or by the person appointed his guardian by the Ct. Mitf. 250.

Answers signed by counsel except when taken by Commᵗᵉ Mitf. 250

If Pltff supposes the answer to be insufficient i.e. not full & explicit he may except to it - stating such parts of the bill as the exceptions are not answered & praying that Defᵗ may as to those parts make a full answer. Mitf. 250.

A further answer in this cause is considered as part of the first & an answer to an amended bill as part of the answer to the original bill. Mitf. 252. 3 Atk 303

The Defᵗ may disclaim all right & title to the subject or to any part of it - but a disclaimer can hardly be made without an answer - For a disclaimer is only a denial of present int.

But Defts may have had an int & disbond of it - & an ans: is generally necessary so far as to ascertain this fact. Mit. 253.

The form of a disclaimer is that Defts disclaim all right & title to the subject demanded. Mit. 253.

A disclaimer admits of no reply & the Bs will in general on disclaimer make dismiss the bill with costs. Mit. 254. 3 Atk. 582.

Defts may demur to one part of the bill - plead to another answer to another & disclaim as to another but then must respectively refer to diffts & distinct parts of the bill. For he cannot plead to what he has demurred to; nor answer any part to which he has demurred or pleaded - The demr praying judg: whether he shall make any answer: & the plea whether he shall make any of the answer: Nor can he claim by ans: what he has once disclaimed. Mit. 254. 2 Bro. P. C. 20.1

A plea or answer then overrules a demurrer - & an answer a plea

Of Replications.

A replication is Plffs reply to Defts plea or ans: Mit. 255

Formerly it was usual for Plff to reply specially to special matter alleged in the plea or answer unless he thot it advisable to deny the plea or answer generally Mit 255.

The consequence of this practice was frequently a long train of special pleadings which was found inconvenient in Chy proceedings Mit. 255.6

Kinder. 284. — The practice is now settled. Special replications are out of use: Pltff is to be relieved according to the forms of the bill whatever new matter Defts may have alleged. Mit. 256 - Kinder 284.5. 1 Rost. 581.

And if a Pltff conceives that from any new matter offered by Defts. his bill is not adapted properly to his case he may amend it: — and to the bill thus amended Defts may make new defence. Mit. 256.7. Kinder 285.

The gen.l replication now in use is that Pltffs bill is true, certain & sufficient" & that the plea is untrue uncertain & insufficient. Kinder 285.6

If Pltff does not reply at all, the plea or answer is taken to be true. Kinder 283.4.